12

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted]

No. [redacted] 44

RICHARD FERRIS, PLAINTIFF IN ERROR,

vs.

CHARLES FROHMAN, CHARLES HADDON CHAMBERS, AND STEPHANO GATTI.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

FILED MAY 4, 1909.

(21,644.)

(21,644.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1909.

No. 439.

RICHARD FERRIS, PLAINTIFF IN ERROR,

vs.

CHARLES FROHMAN, CHARLES HADDON CHAMBERS, AND STEPHANO GATTI.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

INDEX.

	Original.	Print.
Caption	1	1
Transcript from superior court of Cook county, Illinois	1	1
Caption	2	1
Summons	2	2
Sheriff's return	3	2
Amended answer	4	2
Amended bill of complaint	19	11
Stipulation as to pleadings	34	19
Amendment to answer	34	19
Replication	38	21
Amendment to amended bill	41	23
Decree	42	24
Certificate of evidence	45	25
Supplemental report of Hiram Barber, master	48	27
Objections of complainants to master's report	74	44
Judge's certificate to certificate of evidence	78	46
Appeal bond	79	46
Præcipe for transcript on appeal	80	47
Clerk's certificate	81	48

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 4, 1909.

	Original.	Print.
Proceedings in appellate court	82	48
Assignment of errors	82	49
Clerk's certificate	83	49
Caption	84	50
Order assigning to branch appellate court	85	50
Order as to submission on briefs, &c	86	51
Order granting leave to amend brief	86	52
Opinion	87	52
Judgment	95	56
Order allowing appeal	96	57
Order substituting attorneys	97	57
Order extending time to file appeal bond	97	58
Writ of error	98	58
Clerk's certificate	99	59
Assignment of errors	99	59
Order taking cause under advisement	101	60
Opinion	102	60
Judgment	120	71
Clerk's certificate	121	72
Petition for writ of error	124	72
Assignment of errors	127	74
Allowance of writ of error	129	75
Bond on writ of error	132	75
Writ of error	134	76
Clerk's certificate as to writ of error papers	137	77
Citation and service	138	77
Return to writ of error	140	78

1 At a Supreme Court, Begun and held at Springfield on Tuesday, the Sixth day of October in the year of our Lord One Thousand Nine Hundred and Eight within and for the State of Illinois.

Present: James H. Cartwright, Chief Justice; John P. Hand, Justice; William M. Farmer, Justice; Orrin N. Carter, Justice; Guy C. Scott, Justice; Alonzo K. Vickers, Justice; Frank K. Dunn, Justice; William H. Stead, Attorney General; Warren C. Murray, Bailiff.
Attest:
CHRISTOPHER MAMER, *Clerk.*

Be it remembered, to-wit, on the Eleventh day of November A. D. 1908, the same being one of the days in vacation after the term of Court aforesaid, a certain transcript of record was filed in the Office of the Clerk of the Supreme Court in words and figures as follows to-wit:

No. 6214.

CHARLES FROHMAN ET AL., Plaintiffs,
vs.
RICHARD FERRIS, Defendant.

Error to First District.

2 UNITED STATES OF AMERICA,
State of Illinois, County of Cook, ss:

Pleas, Before the Honorable Joseph E. Gary one of the judges of the Superior Court of Cook County in the State of Illinois holding a branch Court of said Court at regular term of said Sueerior Court of Cook County, begun and holden at the Court house in the City of Chicago in said county and State on the first Monday, being the first day of January in the year of our Lord one thousand nine hundred and six and of the Independence of the United States of America, the one hundred and thirtieth.

Present: The Honorable Joseph E. Gary, Judge of the Superior Court of Cook County; John J. Healy, State's Attorney; Thomas E. Barrett, Sheriff of Cook County.
Attest:
CHARLES W. VAIL, *Clerk.*

Be it remembered that heretofore, to-wit on the 18th day of January A. D. 1901 there issued out of the office of the Clerk of the Superior Court of Cook County the People's Writ of Summons directed to the Sheriff of Cook County to execute, which said Writ with the Sheriff's return thereon endorsed is in the words and figures as follows, to-wit:

Chancery Summons, Superior Court of Cook Co.

STATE OF ILLINOIS,
County of Cook, ss:

The People of the State of Illinois to the Sheriff of said County, Greeting:

We command you that you summon Richard Ferris other-
3 wise known as Dick Ferris and Fred J. Wildman if they shall be found in your County, personally to be and appear before the Superior Court of Cook county on the first day of the term thereof, to be held at the Court House in Chicago in said Cook County, on the first Monday of February next, to answer unto Charles Frohman, Charles Haddon Chambers and Stephano Gatti in their certain Bill of Complaint filed in said court on the chancery side thereof.

And have you then and there this writ with an endorsement thereon in what manner you shall have executed the same.

Witness, John A. Linn, Clerk of our said Court and the seal thereof at Chicago aforesaid this 18th day of January A. D. 1901.

[SEAL.] JOHN A. LINN, *Clerk.*

Copy. 211760. Superior Court of Cook County, February Term, 1901. Charles Frohman et al. v. Richard Ferris et al. Summons in Chancery. Thomas L. Hagan, Solicitor. Pd. $2.00.

Served this writ on the within named defendant Fred J. Wildman by delivering a copy thereof to him this 18th day of January 1901. The other within named defendant not found in my county.

ERNEST J. MAGERSTADT, *Sheriff,*
By F. J. MAGNER, *Deputy.*

And afterwards to-wit on the 22nd day of April A. D. 1901 a certain Amended Answer was filed in the office of the clerk of said court in words and figures following to-wit:

4 STATE OF ILLINOIS,
County of Cook, ss:

In the Superior Court of Cook County. In Chancery.

#211760.

CHARLES FROHMAN, CHARLES HADDON CHAMBERS and STEPHANO GATTI, Complainants,
vs.
RICHARD FERRIS and FRED J. WILDMAN, Defendants.

Amended Answer.

The several amended answer of Richard Ferris to the Bill of Complaint of said Charles Frohman, Charles Haddon Chambers, and Stephano Gatti.

This defendant now and at all times hereafter saving and reserving unto himself all benefit and advantage of exception, or otherwise,

that can or may be had or taken to the many errors, uncertainties and other imperfections in the said bill contained for answer thereto, or to so much thereof as this defendant is advised is or are material or necessary for him to make answer unto, answering says:

I.

This defendant admits that the complainant Charles Frohman is a resident of the city of New York Burrough of Manhattan and State of New York and that said Charles Haddon Chambers and said Stephano Gatti are residents of the city of London, England.

II.

This defendant further answering admits that said Charles Frohman is a theatrical manager and is the manager of six theatres in the city of New York but whether or not he is interested in forty seven theatrical enterprises throughout the United States as well as being interested in theatres in some of the principal *principal* cities
5 in the United States and London, England this defendant is not informed except by said bill and as to said allegations leaves the complainants to their proofs.

III.

This defendant further answering says that whether or not the said Charles Haddon Chambers is a play-right by occupation and is the author and composer of many successful plays, among which are the plays known as "Capt. Swift" "The Idler" "John A. Dreams" "The Hon. Herbert" and "The Tyranny of Tears", and whether or not the complainant Stephano Gatti is by occupation a theatrical manager in the city of London, England, this defendant is not informed except by said Bill and as to said allegations leaves the complainants to their proofs.

IV.

This defendant further answering admits that he is a theatrical man and is engaged in the business of owning and leasing plays for stage productions; that his place of residence is Mount Carmel, in the State of Illinois and this defendant further admits that said Fred J. Wildman is a theatrical agent and engaged in the business of buying, selling and leasing plays for stage productions and resides in the City of Chicago, County of Cook and State of Illinois.

V.

This defendant further answering says that he is not informed except by said bill that in the year 1854 the said Charles Haddon Chambers and one H. C. Stephenson collaborated and composed and were the authors, inventors and proprietors of a certain melodrama in five acts which they jointly named and styled and to which they gave the title "The Fatal Card" and that said melodrama, its
6 plots, scenes, incidents, characters and title were original with said Charles Haddon Chambers and the said B. C. Stephenson and were the joint work of their intellect and imagination and

which was of great value to them as a literary product, to-wit: the sum of many thousands of dollars and this defendant requires strict proof of the said allegations in said bill contained.

VI.

This defendant further answering says that he has no knowledge of and has not been informed except by said bill that said melodrama was written in manuscript form by said Charles Haddon Chambers and said B. C. Stephenson and has never been printed, published or in any manner dedicated for the public use but has been publicly performed by the owners thereof or their lessees, but this defendant says that he is a- utter stranger to all and every such matters and cannot form any belief concerning the same.

VII.

And this defendant further answering says that he has never heard or been informed save by the complainant's said bill whether on or about the 13th day of April 1894 the said Charles Haddon Chambers and the said B. C. Stephenson for a valuable consideration, entered into a contract with Stephano Gatti, by virtue of which contract the said Stephano Gatti became entitled to an undivided one-third interest in and to all the royalties which might be obtained from the production or performance of the said melodrama "The Fatal Card" in the United States of America which said undivided one-third interest in and to said royalties that might be obtained in the United States of America from the performance and production of the said melodrama aforesaid is still the sole and exclusive
7 property of the said Stephano Gatti but required strict proof of said allegations in the said Bill contained.

VIII.

And this defendant further answering says that he has never heard or been informed save by the complainant's said Bill whether on or about the 25th day of March 1895, the said B. C. Stephenson sold, assigned and transferred, for a valuable consideration, to said Charles Frohman all his right, title and interest in and to the said melodrama "The Fatal Card" with the exclusive right to produce, perform and represent said melodrama in the United States of America and Canada and of said allegations he requires strict proof; and this defendant further says that he has never heard of been informed save by the complainant's said bill whether the said Charles Haddon Chambers and Stephano Gati, for a valuable consideration, assented to said transfer and of said allegation he requires strict proof; but this defendant further answering denies that the said Charles Frohman has ever since said March 25th, 1895, or at any other time retained or does now retain the exclusive right to produce and represent the melodrama "The Fatal Card" owned and controlled by this defendant as hereinafter more particularly set forth.

IX.

And this defendant further answering says that he has never heard or been informed save by the complainant's said bill whether the said Charles Haddon Chambers ever sold transferred or assigned his interest in and to the Melodrama "The Fatal Card" or his interest in and to the royalties obtained and to be obtained from the performance of said play to any person or persons;

8

X.

And this defendant further answering says that he has never heard or been informed save by the complainant's said bill whether the melodrama heretofore mentioned was publicly produced in the city of New York and the principal cities of the United States of America and the Dominion of Canada under the personal supervision of said Charles Frohman, or whether the productions of the same in said places were artistically and financially a success and the receipts from the patrons of the play houses at which said productions took place were of great value, to-wit, amounting to many thousands of dollars or that the said Charles Frohman laid out and expended large sums of money in order to have the said property produced in keeping with the intrinsic value of said melodrama or whether the said Charles Frohman caused said performances and expenses incurred in producing the same to be made after the date of his purchase of the interest of said B. C. Stephenson hereinbefore referred to;

XI.

This defendant further answering says that he has never heard or been informed save by said complainant's bill that the said melodrama "The Fatal Card" composed by the complainants Charles Frohman, Charles Haddon Chambers and said B. C. Stephenson, as alleged in said bill, is a highly artistic, popular and meritorious play or wherever it has been publicly performed either in Europe, Canada or the United States of America it has met with the approval of the press and the theatre going public or has been a

9

source of great gains and profits to said complainants; or whether in order to produce said melodrama for public performances the said complainants were obliged to or did expend large sums of money in advertising the merits of said play for lithographs, costumes, sceneries, music, stage furniture, properties, etc.; or whether the right of the sole and exclusive public production and representation of said melodrama was and is of great value to said complainants not only because the melodrama was in itself a production worthy to bestow honor and profit upon its authors and owners, but because of its superior merits it was produced in the leading and highest admission priced theatres in the United States of America and Canada in which as a rule only the highest classed artists in the theatrical profession performed and the highest classed plays were produced and at which performances the most cultured and enlightened audiences were in attendance.

XII.

This defendant further answering says that he has never heard or been informed save by complainant's said bill whether since the date of the purchase by said Charles Frohman from the said B. C. Stephenson of the latter's interest in said melodrama one George E. MacFarlane has written what he claims to be a new and independent play called "The Fatal Card" which is a melodrama in five acts, but this defendant admits that one George E. MacFarlane, at a time wholly unknown to this defendant wrote a play called "The Fatal Card" which is a melodrama in five acts; but this de-
10 fendant denies that said melodrama so written by said MacFarlane is almost a verbatim et literatim copy of the play owned by the complainants or either of them, or any one else; admits that it contains substantially the same number of acts but this defendant denies that it contains substantially the same number of scenes plots or characters or the same scenes, plots or characters as the complainant's said play and that the said plots, scenes, acts and characters are not substantially the same as those in the melodrama referred to in said bill as the property of the complainants; and this defendant denies that the only substantial difference between the melodrama of the complainants and that of the said MacFarlane is that there are a few immaterial dialogues which appear in the said MacFarlane play which do not appear in the play alleged to be owned and the property of the complainants; admits that the plot of the MacFarlane play is laid in Boston, Massachusetts, California and the Klondike and that the alleged play of the complainants is laid in Colorado and Cockham, England; admits that the characters in the MacFarlane play are of different names than in the play alleged to be owned by the complainants; denies that the parts taken by the characters in both plays are substantially the same and this defendant denies that the said play so written by said MacFarlane is substantially a stolen and pirated copy as will more fully appear from the said MacFarlane play, marked defendant's exhibit "I," now on file with the clerk of said court, reference being had thereto and which defendant's exhibit is made a part hereof; the said defendant's exhibit "B" not being a true copy of the said MacFarlane play "The Fatal Card."

11 XIII.

This defendant further answering admits that on or about the 29th day of July A. D. 1900 the said George E. MacFarlane made a conveyance and assignment of the said melodrama so prepared by him as aforesaid to this defendant and this defendant avers and states the fact to be that said conveyance and assignment from said MacFarlane to him was made for a valuable consideration and that said conveyance and assignment aforesaid conveyed and assigned to this defendant all of the right, title and interest which the said MacFarlane had in said melodrama to said defendant and that the same was delivered to this defendant by said MacFarlane and this defendant says that he so purchased and received said melodrama without any knowledge or intimation whatever that the melodrama

claimed by said complainants in their said bill (a copy of which is made exhibit "A" in complainant's said bill) was owned or controlled by said complainants as alleged in their said bill, or that the same had been publicly produced by the complainants or either of them in manner and form as alleged in the said bill, and this defendant further avers that this defendant was an innocent purchaser of said melodrama from said George E. MacFarlane for a valuable consideration by this defendant paid to the said George E. MacFarlane;

XIV.

And this defendant further answering admits that on the 16th day of August A. D. 1900 this defendant deposited in the office of the librarian of Congress of the United States of America a copy of the said play or melodrama so purchased by him from George E. MacFarlane as aforesaid with the name or title "The Fatal Card"
12 and that he thereupon paid to the said Librarian of said Congress of the United States of America, the fees required by law to be paid to entitle this defendant to have the said play or melodrama "The Fatal Card" copyrighted under, by virtue of and pursuant to the statutes of the United States of America in such case made and provided and that thereupon there was issued to your orator by the said Librarian of Congress a certificate of copy-right, which is now owned and held by this defendant, the number of said copyright being 20539 Class "A;" and this defendant denies that at the time of so purchasing said melodrama as aforesaid or at the time of obtaining said copyright as aforesaid he had any knowledge of the pretended rights of the complainants, or either of them, or any other person or persons, and says that he has at no time defrauded them or either of them in any way; And this defendant further says that prior to the time of his obtaining a copyright as aforesaid that the complainants had not obtained a copyright from the Librarian of Congress of the United States of said melodrama and that neither of them had therefore obtained a copyright of said melodrama according to the statutes of the United States in such case made and provided.

XV.

And this defendant further answering admits that since he copyrighted the said melodrama he entered into a business arrangement with Fred J. Wildman, one of the defendants herein, whereby he authorized the said Wildman to act for him as his agent with the exclusive right to arrange for the production of the said copy-
13 righted play with the various managers of theatres and stock companies throughout the various cities of the United States, and this defendant admits that the said Wildman, pursuant to said arrangement with this defendant, and while acting as his agent has made contracts with many of the managers of theatres and stock companies for the production of said play in the United States and said managers have caused to be publicly performed said copyrighted play for which the patrons in attendance at the said theatres paid to said managers admission fees but as to the amount

of said fees this defendant is an utter stranger to all and every such matter and cannot form any belief concerning the same. And this defendant further admits that the said Wildman, as agent of this defendant, has publicly advertised said play or melodrama "The Fatal Card" and that the said play or melodrama has been successfully produced at many of the public theatres in the United States, that said defendant controls the entire edition of the printing for the said play "The Fatal Card" and that the said Wildman has the exclusive right to arrange for the production of the said play and that all communications regarding it should be addressed to said Wildman and that he, the said Wildman would give special terms to stockhouses and that in said circulars the said Wildman published a warning to managers that all rights to the four act melodrama "The Fatal Card" are covered by United States copyright No. 20539 and that local managers and managers of companies will be held liable for any infringement and that the said Wildman
14 is the sole and exclusive agent of said defendant to arrange for the productions of said play and that all managers of theatres are forbidden to produce said play unless by the authority of said defendant and if such managers produce said play without such aut-ority they will be prosecuted therefor; but this defendant denies that thereby he meant or intended that the complainants have no right, title or interest in and to their said play and that the complainants have no right to lease, represent or perform the same as this defendant is an utter stranger to all and every such matters and cannot form any belief concerning the same; And this defendant says that the play or melodrama referred to in said circulars and printed matter and in regard to which he entered into a business arrangement with said Wildman as aforesaid and which play has been publicly performed under the authority of this defendant as aforesaid and for which he controls the entire edition of the printing as aforesaid, and in regard to which all communications should be addressed to said Wildman as aforesaid, and in regard to which said Wildman would give special terms to stockhouses as aforesaid is the five act melodrama known as "The Fatal Card," so purchased and paid for by this defendant and which this defendant bought from said MacFarlane as aforesaid for a valuable consideration and for the production and ownership of which play this defendant holds a copyright as aforesaid and this defendant says that at all times whenever an arrangement of any kind has been entered into by him with any person or persons whomsoever for the production
15 of the said play "The Fatal Card," since he so purchased the same from the said George E. MacFarlane he has made it well known and it has been well understood by such person or persons that the play referred to as aforesaid was the five act melodrama called "The Fatal Card," which had been written by one George E. MacFarlane reference being had to said defendant's exhibit 1, the right to produce which had been purchased by this defendant as aforesaid and this defendant denies that such acts and doings are in violation of any rights held by the complainants or either of them.

XVI.

And this defendant further answering says that since he copyrighted the said MacFarlane play as aforesaid he has exercised acts of ownership over said play necessary to protect his interest in and right to said play and to realize as much as possible from the legitimate use of said play and this defendant admits that he has never asked the consent or authority of said complainants or either of them, to use his said play and says that he, the defendant, has never done anything to cause a belief or create an impression upon the minds of any person or persons whomsoever that his said melodrama "The Fatal Card" was the same as the one claimed by said complainants in their said bill as written by said Stephenson and Chambers.

XVII.

And this defendant further answering says that he has never heard or been informed save by the said complainant's said bill whether the alleged play referred to as the play of Stephenson and Chambers in the said bill is superior to the play now owned
16 and controlled by this defendant as aforesaid, and this defendant particularly denies that in presenting and causing his said play as aforesaid to be publicly acted, performed and represented and in licensing and permitting the same to be publicly acted, performed and represented he has traded or attempted to trade upon the reputation of any other play whatsoever; and this defendant denies that he has succeeded in earning a large amount of money by the licensing of said play "The Fatal Card" and has made large profits therefrom but upon the contrary avers the fact to be that he has expended large sums of money for the purchase of said play and for the production of the same and the necessary expenses incurred in producing the same and causing the same to be produced as aforesaid, and that such money so expended has been largely in excess of any and all monies together which this defendant has received directly and indirectly, or in any way, from the production or presentation of the said play, "The Fatal Card by him, or others under authority from him, as aforesaid.

XVIII.

And this defendant further answering denies that any loss whatsoever has accrued to the complainants or either of them by any of the acts and doings of this defendant; and this defendant says that he has never heard or been informed as to the rates which the complainants have ever charged for the licensing of any play which they mat own and this defendant denies that by reason of anything which this defendant has done in the premises the complainants or either or any of them, have been injured or damaged in the
sum of many thousands of dollars or in any sum or amount
17 of money whatsoever.

XIX.

This defendant further answering denies the allegation in said bill that the complainants have no adequate or complete remedy

at law or that they will continue or ever have sustained any damage whatsoever by reason of the performing, acting or representing of the said play so owned by this defendant as aforesaid in the manner and form complained of and of the advertisements and offers by this defendant in manner and form complained of or all of which has or will continue to seriously lesson or diminish the value of any play which the said complainants may own or diminish their profits from any play whatsoever.

XX.

This defendant further answering denies that he is insolvent and says that there was no reason for the statement in said bill that irreparable injury and damage will be done to these complainants unless an injunction immediately and without notice issues and says that no exigency existed in the premises which called for the immediate issuing of an injunction against this defendant and denies that the complainants, or either or any of them, had any right whatever to an injunction restraining this defendant from renting, licensing, advertising, selling, producing, or performing the said play "The Fatal Card" as asked for in the said bill and this defendant denies that the said complainants or any of them are entitled to any relief in the premises.

18 XXI.

And this defendant denies all and all manner of unlawful combination and confederacy, wherewith he is by the said bill charged, without this that there is any other matter, cause or thing in the complainant's said bill of complaint contained, material or necessary for this defendant to make answer unto and not herein and hereby well and sufficiently answered, confessed, traversed and avoided or denied, is true to the knowledge or belief of this defendant; all which matters and things this defendant is ready and willing to aver, maintain and prove, as this Honorable Court shall direct; and prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

RICHARD FERRIS.

S. E. CHIPMAN,
Solicitor for Defendant, Richard Ferris.

STATE OF WISCONSIN,
County of La Crosse, ss:

Richard Ferris, being first duly sworn, deposeth and sayeth that he is one of the defendants in the above answer by him subscribed; that he has read the same and knows that the statements and allegations therein contained are true of his own personal knowledge, except as to those statements and allegations which are specifically made upon his information and belief, and that as to those statements and allegations specifically made upon his information and belief he believes them to be true.

RICHARD FERRIS.

19 Subscribed and sworn to before me this 11th day of April A. D. 1901.

[NOTARIAL SEAL.] JOHN F. DOHERTY,
Notary Public, La Cross, Wisconsin.

And afterwards to-wit on the 11th day of June A. D. 1902 a certain Amended Bill was filed in the office of the Clerk of said Court, in words and figures following to-wit:

STATE OF ILLINOIS,
County of Cook, ss:

In the Superior Court of Cook County.

CHARLES FROHMAN, CHARLES HADDON CHAMBERS and STEFANO GATTI, Complainants,
vs.
RICHARD FERRIS and FRED. J. WILDMAN, Defendants.

To the Honorable Judges of said Court in Chancery Sitting:—

Your orators, Charles Frohman, Charles Haddon Chambers and Stefano Gatti, sole surviving partner of the firm of A. & S. Gatti, by Thomas S. Hogan, their solicitor, in this their amended bill; leave to file the same first having been given by the court, respectfully represent unto your Honors.

(1.)

That your orator, Charles Frohman, is a resident of the City of New York, Burough of Manhattan, State of New York, and that your orators Charles Haddon Chambers and Stefano Gatti are residents of the City of London, England;

20 (2.)

That your orator Charles Frohman is a theatrical manager, and is the manager of six theaters in the city of New York, and is interested in forty seven (47) theatrical enterprises throughout the United States, as well as being interested in theaters in some of the principal cities in the United States and London, England.

That your orator, Charles Haddon Chambers is a play-right by occupation and is the author and composer of many successful plays among which are the plays known as "Capt. Swift" "The Idlers" "John A. Dreams" "The Hon. Herbert" and "The Tyranny of Tears," and your orator, Stefano Gatti is by occupation a theatrical manager in the City of London, England aforesaid.

(3.)

That Richard Ferris, otherwise known as "Dick Ferris" is a theatrical man and is engaged in the business of owning and leasing plays for stage productions, whose place of residence is unknown to your orators, and Fred J. Wildman is a theatrical agent and engaged in the business of buying, selling and leasing plays for stage

production and resides in the City of Chicago, County of Cook, in the State aforesaid, both of which last named persons are made defendants herein.

(4.)

Your orators further represent unto your Honors, that in the year 1894 your orator, Charles Haddon Chambers and one B. C. Stephenson, who was also a dramatic author and playwright collaborated and composed, and were the authors, inventors and proprietors of
21 a certain melodrama in five (5) acts which they jointly named and styled, and to which they gave the title "The Fatal Card," and that said melodrama, its plots, scenes, incidents, characters and title were original with your orator, Charles Haddon Chambers and the said B. C. Stephenson, and were the joint work of their intellect and imagination, and which was of great value to them as a literary product to-wit: the sum of many thousands of dollars, a copy of which manuscript is hereto attached, marked exhibit "A" and made a part thereof.

(5.)

Your orators further represent unto your Honors that said melodrama was written in manuscript form by your orator, Charles Haddon Chambers, and the said B. C. Stephenson, and has never been printed, published or in any manner dedicated for the public use; but it has been publicly performed by the owners thereof, or their lessees, as hereinafter will more particularly appear.

(6.)

Your orators further represent unto your honors that on or about the 30th day of April 1894 and while your orator Charles Haddon Chambers and the said B. C. Stephenson were the sole and exclusive owners of and before they had written said melodrama "The Fatal Card" they for a valuable consideration entered into a contract with the firm of A. & S. Gatti by virtue of which contract said firm of A. & S. Gatti became entitled to an undivided one third interest in and to all the royalties which might be obtained from the production or performance of said melodrama "The Fatal Card" in the United States of America and elsewhere, which said undivided one third interest in and to said royalties is now the sole and ex-
22 clusive property of your orator, Stefano Gatti, as the sole and surviving partner of said firm of A. & S. Gatti and at the time of the making of said contract between said Chambers and Stephenson and the said firm of A. & S. Gatti, said firm was composed of A. Gatti and Stefano Gatti, and since the making of said contract said A. Gatti had died, leaving your orator, Stefano Gatti, the sole surviving partner of said firm of A. & S. Gatti, and your orator, Stefano Gatti, has ever since the death of said A. Gatti carried on and he does now carry on the business of the firm of A. & S. Gatti, under the name of said old firm.

(7.)

Your orators further represent unto your Honors that on or about the 13th day of June 1894, and before said play, "The Fatal Card" had been written and before it had been publicly produced or performed your orator Charles Frohman, for a valuable consideration, purchased from the authors an option on said play for the sole and exclusive American rights thereof, and thereafter and that on or about the 25th day of March 1895, and while your orator Charles Haddon Chambers and the said B. C. Stephenson were the sole and exclusive owners of and before they or either of them had rented, leased or given the right to produce or perform their melodrama aforesaid, or disposed of any part or interest in the royalties, except to the said firm of A. & S. Gatti as aforesaid, the said B. C. Stephenson for a valuable consideration sold, assigned and transferred to your orator, Charles Frohman all his right, title and interest in and to the said melodrama "The Fatal Card" with the exclusive
23 right to produce, perform and represent said melodrama in the United States of America and Canada, your orators, Charles Haddon Chambers and said firm of A. & S. Gatti, for a valuable consideration then and there assented, which said right, title and interest in said melodrama, together with the exclusive right to produce and represent said melodrama in the United States of America and Canada, so purchased as aforesaid from the said B. C. Stephenson, your orator, Charles Frohman has ever since and now retains.

(8.)

Your orators further represent unto your honors, that your orator, Charles Haddon Chambers has never sold, transferred or assigned his interest in and to the melodrama "The Fatal Card" or his interest in and to the royalties obtained, and to be obtained, from the performances of said play to any person or persons, and that he has ever since the writing or said play retained his interest as hereinbefore set forth and does now retain the same.

(9.)

Your orators further represent unto your Honors that the melodrama heretofore mentioned was publicly produced in the City of New York and the principal cities of the United States of America and the Dominion of Canada, under the personal supervision of your orator, Charles Frohman, and that the productions of the same in said places were artistically and financially a success and the receipts from the patrons of the play houses at which said productions took place were of great value to-wit: amounting to many thousands of dollars, and that your orator, Charles Frohman, in order to properly produce said play as aforesaid, did lay out and expend divers
24 large sums of money, to-wit: many thousands of dollars in order to have the same properly produced in keeping with the intrinsic value of said melodrama. Your orators further state that your orator Charles Frohman caused the performances herein referred to and expenses incurred in producing the same, to be made

after the date of his purchase of the interest of said B. C. Stephenson in said melodrama.

(10.)

Your Orators further represent unto your Honors that the said melodrama "The Fatal Card", composed as aforesaid by your orator Charles Haddon Chambers and said B. C. Stephenson is a highly artistic, popular and meritorious play and wherever it has been publicly performed, either in Europe Canada or the United States of America, it has met with the approval of the press and the theatre going public and has been a source of great gains and profits to your orators. Your orators further state that in order to produce said melodrama for public performances they were obliged to and did expend very large and divers sums of money to-wit, many thousands of dollars, in advertising the merits of said play, for lithographs, costumes, sceneries, music, stage furniture, prooperties, etc. and the right of the sole and exclusive public production and representation of said melodrama was and is of great value to your orators, not only because the melodrama was in itself a production worthy to bestow honor and profit upon its authors and owners, but because of its superior merits, it was produced in the leading and highest admission prices theatres in the United States of America and Canada, in which as a rule only the highest classed artists in the theatrical profession performed and the highest classed plays were produced and at which performances the most cultured and enlightened audiences were in attendance.

(11.)

Your orators further represent unto your Honors that since the date of the purchase by your orator, Charles Frohman, from the said B. C. Stephenson of the latter's interest in said melodrama one George E. MacFarlane has written what he claims to be a new and independent play called "The Fatal Card", which is a melodrama in five (5) acts, but which said melodrama so written by said MacFarlane is almost a *verbatim et literatim,* copy of the play owned by your orators and contains substantially the same number of acts, scenes, plots and characters, as your orator's said play, and which said acts, scenes, plots and characters are substantially the same as those in the melodrama owned by your orators, and the only substantial difference between the melodrama of your orators and that of the said MacFarlane is that that there are a few immaterial dialogues which appear in the said MacFarlane's play, which do not appear in your orator's said play, and the plot of the MacFarlane play is laid in Boston, Massachusetts, California and the Klondike, while the plot of your orator's said play is laid in Colorado and Cookham, England, and the characters in the MacFarlane play are of different names than in your orator's play, although the parts taken by the characters in both plays are substantially the same, and in all the material parts of your orator's said play the said MacFarlane's play is substantially a stolen and pirated copy, as will more fully appear from the said MacFarlane play a copy

of which is hereto attached, marked exhibit "B" and made a part hereof.

(12.)

Your orators further represent unto your Honors, on information and belief, and so charge the fact to be, that on or about the — day of —— 1898, the said George E. MacFarlane, made a conveyance or assignment of the said melodrama so prepared by him as aforesaid, to the said Richard Ferris, and on or about the — day of —— 1900, for the purpose of securing to himself the sole and exclusive monopoly of renting, leasing and performing the said melodrama "The Fatal Card" and the sole and exclusive rights to the rents, issues and profits thereof, the said Richard Ferris, under the name of "Dick Ferris" made an application for and secured and obtained a copyright, it being copyright number 20539, under the laws of the United States of America, for the said MacFarlane play under the name and title of "The Fatal Card", which said MacFarlane play in its copyrighted form is complainants' said exhibit "B" attached hereto, and all said acts and doings by the said George E. MacFarlane and Richard Ferris were with full knowledge of your orators' rights in the premises and were for the purpose of injuring and defrauding your orators and were done without the knowledge consent or authority of your orator- or either of them.

27

(13.)

Your orators further show unto your Honors that the said Richard Ferris since he copyrighted the said MacFarlane play, has entered into a business arrangement with the said Fred J. Wildman, one of the defendants herein, whereby he authorized the said Fred J. Wildman to act for him as his agent with the exclusive right to arrange for the production of said coprighted play with the various managers of theatres and stock companies throughout the various cities of the United States, and the said Fred A. Wildman pursuant to said arrangement with the defendant, Richard Ferris, and while acting as his agent, has made contracts with many of the managers of theatres and stock companies in the various cities of the United States for the production of said play, and said managers have caused to be publicly performed said copyrighted play for which the patrons in attendance at the said theatres paid to said managers admission fees amounting to thousands of dollars. And your orators further state that the said Fred J. Wildman as agent of the said Richard Ferris has publicly advertised and is now publicly advertising in catalogues and circulars, which he causes to be published and circulated, that the said play "The Fatal Card" is the sole property of Mr. Dick Ferris, (meaning thereby the said defendant Richard Ferr-s), and that the said play "The Fatal Card" has been successfully produced by Walter S. Baldwin's stock companies at Cincinnati, Ohio, and New Orleans, Louisiana, Grand Opera House Stock Company, Nashville, Tennessee, Lyceum Theatre Stock Company, Brooklyn, New York, Ferris Comedians, Klimpt-Hearn Co. Huntley-Jackson Co. Gibney Stock Co. Hurray Comedy Co. Gaskell Stock Co. and

others, and that said Ferris now controls the entire edition
28 of the printing for this play (meaning thereby the play known as "The Fatal Card") consisting of a full line of lithograph stands, three sheets and window work, and that the said Fred J. Wildman at Room No. 1012 Chicago opera House Block, Chicago, Illinois has the exclusive right to arrange for the production of this popular play, (Meaning thereby the play known as "The Fatal Card") and that all communications regarding it should be addressed to said Fred J. Wildman, and that he said Wildman would give special terms to stock houses, and in said circulars the said Fred J. Wildman publishes a warning to managers that all rights to the four act melodrama "The Fatal Card" are covered by United States copyright No. 20539 and that local managers and managers of companies will be held liable for any infringement, meaning and intending thereby that the said defendant, Richard Ferris, is the sole and exclusive owner of said play, "The Fatal Card" and that the said Fred J. Wildman is the sole and exclusive agent of said Richard Ferris to arrange for the productions of said play, and that all managers of theatres are forbidden to produce said play, unless by the authority of said Fred J. Wildman and if said managers produce said play without authority from said Fred J. Wildman they will be prosecuted therefor, and further meaning and intending thereby that your orators have no right, title or interest in and to the said play known as "The Fatal Card" and that your orators have no right to lease, represent or perform the same and all of which said acts and doings of said Richard Ferris and the said Fred J. Wildman are in violation of the rights of your orators in the premises and are done by the said Richard Ferris and Fred
29 J. Wildman with their full knowledge of your orators' rights in the premises and without their authority and consent.

(14.)

Your orators further show unto your Honors, upon information and belief and they so charge the fact to be, that to deceive the public and to make the said play of the said defendants appear to be the play of your orators, to-wit your orators' play "The Fatal Card" the title of your orators' play "The Fatal Card" has been boldly incorporated in the title of the said defendants' play with the full knowledge of your orators' rights therein and thereto and without their consent or authorization; and that theatrical managers have contracted with the said defendants to pay royalties to said defendants to produce the said defendants' play and the public have been and are induced to attend its public performances for pay, under the belief and impression that it is the play of your orators, to-wit; "The Fatal Card," by B. C. Stephenson and Charles Haddon Chambers one of the complainants herein.

(15.)

Your orators further represent unto your Honors, and charge the fact to be that the said play of the said defendants is greatly inferior to the play of your orators in many respects and the defendants in presenting and causing their play to be publicly acted, performed

and represented and in licensing and permitting the same to be publicly acted, performed and represented have been and are trading upon the reputation, which your orators' said play has ob-
30 tained by reason of its excellence and the money expended in advertising, staging, and costuming the same; that the defendants have succeeded in earning a large amount of money to-wit, many thousands of dollars by the licensing of the said play as your orators are informed and verily believe, and so charge the fact to be, and have made large profits therefrom to-wit; many thousands of dollars, which said profits are divided between the said defendants but your orators are unable to state in what proportion or in what manner said profits are divided.

(16.)

Your orators further represent unto your Honors and charge the fact to be that the said defendants are continuing to license and to announce and to advertise and offer for license upon stipulated sums to be paid them and upon royalties in the manner and form aforesaid, to the great and irreparable loss and damage to your orators and that they have offered and are now offering and licensing out their said play at much cheaper and lesser rates than your orators have or can rent out their said play, much to your orators' loss and by reason of which your orators' royalties rents, incomes and profits from said play have almost ceased, and they have been injured and damaged thereby to-wit: in the sum of many thousands of dollars.

(17.)

Your orators further represent unto your Honors, and show that they have no adequate or complete remedy at law and that they have and will continue to sustain damage by reason of the performing acting and representing of the said play in the manner and form complained of and of the advertisements and offers by the
31 said defendants in manner and form complained of, and all of which has and will continue to seriously lessen and diminish the value of your orators' said play, and diminish the profits, received by your orators by way of royalties and profits to which they are entitled, which said damages will be irreparable and cannot be adequately measured in an action at law by any certain pecuniary standard.

(18.)

Your orators further represent unto your Honors that the said defendants are insolvent and to defeat the purposes of this bill and the injunction sought to be obtained against them they have threatened and do now threaten to make other further and additional contracts with managers of theatres and stock companies, for the leasing of said play "The Fatal Card" and thereby to obtain the royalties and profits accuring therefrom, which said royalties and profits they could not obtain after said injunction is served upon them, and your orators believe and have good reasons to believe and so charge the fact to be that if notice be given to the said defendants or either of them, that an application will be made in this cause for an in-

junction as prayed for in this bill, that the said defendants will carry out their threats and make contracts for the leasing of said play to said managers of theatres and stock companies, to the irreparable injury and damages of your orators, unless said injunction be issued immediately and without notice to said defendants or either of them.

32 Forasmuch therefore, as your orators are without remedy in the premises except in a court of equity, and to the end that the said Richard Ferris, otherwise known as "Dick Ferris" and the said Fred J. Wildman, who are made defendants to this bill may be required to make full and direct answer to the same, but not under oath (the answer under oath being hereby waived) and that the said Richard Ferris, otherwise known as "Dick Ferris" and the said Fred J. Wildman, their agents, attorneys and employés may be enjoined and restrained from renting, licensing, advertising, selling, producing or performing said play "The Fatal Card" or permitting or causing the said play "The Fatal Card" to be rented, licensed, advertised, sold or produced or announcing or causing it to be announced that they are the owners or agents of, or that they have the right to rent or license, the said play "The Fatal Card" and from in any manner interfering or meddling therewith and that the said defendants be decreed to render a true and correct account of all public performances of said play "The Fatal Card" given with their consent and authority together with all profits, rents, issues, income and royalties received by them or either of them by reason thereof, and that your orators have such other order, decree and relief in the premises as the nature of this case shall require and to your honor shall seem meet.

May it please your Honors to grant the writ of summons in Chancery, directed to the Sheriff of the said County of Cook commanding him that he summon the defendants Richard Ferris, other-

33 wise known as "Dick Ferris" and Fred J. Wildman to appear before the said Court on the first day of the next February term thereof, to be held in the Court House in the County of Cook aforesaid, and then and there to answer this bill, etc.

May it please your Honors to grant unto your orators the People's Writ of Injunction to be directed to the said Richard Ferris otherwise known as "Dick Ferris" and Fred J. Wildman and to their agents, attorneys and employés enjoining and restraining them and each of them from renting, licensing advertising, selling, producing or performing said play "The Fatal Card" and from permitting or causing the said play "The Fatal Card" to be rented, licensed, advertised, sold or produced and from announcing or causing it to be announced that they are the owners or agents of or that they have the right to rent or license said play "The Fatal Card", and from in any manner interfering or meddling therewith, until further order of this court.

CHARLES FROHMAN,
CHARLES HADDEN CHAMBERS,
STEFANO GATTI,
Sole Surviving Partner of the Firm of
J. A. & S. Gatti, Complainants.

By THOMAS S. HOGAN,
Solicitor for Complainants.

STATE OF ILLINOIS,
County of Cook, ss:

Thomas S. Hogan being duly sworn deposes and says that he is the solicitor for the complainants in the above entitled cause, that he has read the foregoing amended bill of complaint, and
34 knows the contents thereof, and the matters and things therein set forth are true as therein stated; that he bases his knowledge for making this affidavit upon the depositions of Charles Frohman, Charles Haddon Chambers, E. C. Stephenson and Stefano Gatti, filed in this cause, in which said cause proofs have been closed for complainants and defendants and the statement of facts in the foregoing amended bill of complaint is shown in said deposition and are uncontradicted by any evidence in this cause. Affiant further states that all of the complainants in this cause are nonresidents of the State of Illinois, and reside in the City of New York, and in the city of London, England.

THOMAS S. HOGAN.

Subscribed and sworn to before me this 10th day of June A. D. 1902.

[SEAL.] KATHRYN E. SHAW,
Notary Public.

And afterwards to-wit on the 16th day of June A. D. 1902 a certain Stipulation was filed in the office of the Clerk of said Court in words and figures following to-wit:

STATE OF ILLINOIS,
Cook County, ss:

In the Superior Court of Cook County.

Gen'l No. 211760. Term No. 6508.

CHARLES FROHMAN et al.
vs.
RICHARD FERRIS et al.

It is stipulated and agreed by and between the solicitors for complainants and defendants that the answer heretofore filed to said bill of complaint and the replication to said answer may
35 stand as the answer to amended bill of complaint herein and as the replication to said answer.

THOMAS S. HOGAN,
Solicitor for Complainants.
L. E. CHIPMAN,
Solicitor for Defendants.

And afterwards to-wit on the 27th day of March A. D. 1903 a certain amendment to answer was filed in the office of the clerk of said court in words and figures following to-wit:

STATE OF ILLINOIS,
Cook County, ss:

In the Superior Court of Cook County.

Gen. No. 211750. Term No. 6508.

CHARLES FROHMAN, CHARLES HADDON CHAMBERS and STEPHANO GATTI, Complainants,
vs.
RICHARD FERRIS and FRED J. WILDMAN, Defendants.

Amendment to Answer of Richard Ferris in this Cause Made Pursuant to an Order of the Court Entered on the 24th Day of February, A. D. 1903.

On page — after the paragraph numbered in Roman numerals "XIX" insert as an independent paragraph in said amended answer and numbered.

XIX½ "And for a further answer to complainants said bill these defendants say that by the Act of 5 & 6 Victoria, Chap. 45, entitled "An act to amend the Law of Copyright," in force July 1, 1842, it
musicel compositions, upon compliance with the copyright
36 shall extend to and embrace dramatic literary property and
musical compositions, upon compliance with the copyright
laws of the United Kingdom of Great Britain and Ireland, which laws require, and did at the time of the performance as hereinafter set forth, of the play mentioned in the complainants bill, that in order to preserve and retain an ownership in any dramatic piece in manuscript it should be necessary and sufficient for the person having the sole liberty of representing or performing or causing to be represented or performed, the same, to register in the book of registry of the Stationer's Company as in said Act provided, only the title thereof, the name and place of abode of the author or composer thereof, and the name and place of abode of the proprietor thereof, and the time and place of its first representation or performance.

And it is further provided in and by said Act that no assignment of the copyright of any book consisting of or containing a dramatic piece or musical composition, shall be holden to convey to the assignees the right of representing or performing such dramatic piece or musical composition, unless an entry in the said registry book shall be made of such assignment, wherein shall be expressed the intention of the parties that such right should pass by such assignment.

And it is in and by said Act further provided, that "the provisions hereinbefore enacted in respect of the property of such copyright and of registering the same, shall apply to the liberty of representing
or performing any dramatic piece or musical composition as
37 if the same were herein expressly re-enacted and applied, save
and except that the first public representation or performance

of any dramatic piece or musical composition shall be deemed equivalent, in the construction of this Act to the first publication of any book."

And these defendants aver that said Charles Haddon Chambers and B.C. Stephenson did not nor did e-ther of them, nor did Stephano Gatti, or any of said complainants, or any person in their behalf, do or perform any of the acts required to procure a copyright of said play or comply with the provisions of the act referred to, prior to the sixth day of September 1894, nor prior to the date of the filing of complainants bill herein and the procuring of the injunction in this cause, nor had said assignments of interest in said play or dramatic piece set out in complainant's bill, been registered in said registry as by said Act required prior to the filing of said bill and yet these defendants aver that said play was publicly performed at the Adelphi Theatre, London, England, on September sixth, 1894, pursuant to an arrangement or contract theretofore made between said Chambers and Stephenson and A. & S. Gatti, by reason of which the said play became and remained from that time forth public property and said complainants and each and all of them ceased to have any exclusive property rights therein, and defendants aver that having become public property in England, the complainants cannot maintain their said bill in the United States.

And these defendants insist upon the said statutes and claim the same benefit thereof as if they had pleaded the same at length.

L. E. CHIFAIN,
CHAS. H. ALDRICH,
Solicitors for Def'ts.

38 And afterwards to-wit on the 25th day of November A. D. 1903 a certain Replication was filed in the office of the Clerk of said Court in words and figures following to-wit:

In the Superior Court of Cook County.

STATE OF ILLINOIS,
Cook County, ss:

Gen. No. 211750. Term No. 6508.

CHARLES FROHMAN et al.
vs.
RICHARD FERRIS et al.

Replication of Complainants to the Amendment to the Answer of Richard Ferris.

These replicants saving and reserving unto themselves all manner of advantage of exception to the manifold insufficiencies of the said amendment to said answer, for replication thereunto say:

That they deny that by the act of five (5) and six (6) Victoria Chap. 45, entitled "An Act to amend the law of Copyright," in force July 1st 1842, it is provided among other things;

That the law of copyright shall extend to and embrace dramatic literary property and musical compositions upon compliance with the copyright laws of the United Kingdom of Great Britain and Ireland, which laws require, and did at the time of the performance as hereinafter set forth, of the play mentioned in the complainants bill, that in order to preserve and retain an ownership in any dramatic piece in manuscript it should be necessary and sufficient
39 for the person having the sole liberty of representing or performing or causing to be represented or performed, the same to register in the registry of the stationer's company as in said Act provided, only the title thereof, the name and place of abode of the author or composer thereof, and the name and place of abode of the proprietor thereof, and the time and place of its first representation or performance.

And they further deny that it is further provided in and by said act that no assignment of the copyright or musical composition, shall be holden to convey to the assignee the right of representing or performing such dramatic piece or musical composition, unless an entry in the said registry book shall be made of such assignment, wherein shall be expressed the intention of the parties that such right should pass by such assignment.

And they further deny that it is provided in said act; that "the provisions hereinbefore enacted in respect of the property of such copyright, and of registering the same, shall apply to the liberty of representing or performing any dramatic piece or musical composition as if the same were herein expressly re-enacted and applied save and except that the first public representation or performance of any dramatic piece or musical composition shall be deemed equivalent in the construction of this act to the first publication of any book."

40 And these replicants aver that said Charles Haddon Chambers and B. C. Stephenson by themselves or by their agents for them did perform all of the acts and things required to procure a copyright of said play and did comply with the provisions of the act referred to prior to the sixth day of September 1894 and prior to the date of the filing of complainants bill herein and the procuring of the injunction in this cause and they further aver that the assignments of interest in said play set out in complainant's bill had been duly registered in said registry as by said act required prior to the filing of said bill.

These replicants admit that said play was publicly performed at the Adelphi Theatre, London on the sixth day of September 1894 but deny that said performance was pursuant to an arrangement or contract made between said Chambers and Stephenson and A. & S. Gatti, and deny that by reason of the premises, the said play became and remained from that time forth public property and deny that complainants or any one of them cease to have any exclusive property rights therein, and deny that said play became public property in England; and aver that complainants can maintain their said bill in the United States; of which matters and things these replicants are and will be ready to aver and prove as this honorable

court shall direct and humbly pray as in and by their said bill they have already prayed.

THOMAS S. HOGAN,
Solicitor for Complainants.

And afterwards to-wit on the 18th day of February A. D. 1905 a certain amendment to amended bill was filed in the office of
41 the Clerk of the said Court in words and figures following to-wit:

STATE OF ILLINOIS,
County of Cook, ss:

In the Superior Court of Cook County.

Gen. No. 211760. Term No. 6508.

CHARLES FROHMAN et al.
vs.
RICHARD FERRIS et al.

Now come the above named complainants and by leave of court first had and obtained, file this their amendment to their amended bill of complaint filed herein.

In lieu of the last two lines at the bottom of the page of paragraph 5, page 2, insert the following:

"That said play, The Fatal Card, was first publicly performed at the Adelphi Theatre, London, England, on the 6th day of September 1894, by the owners of said play and that said play was first entered on the 31st day of October 1894, in the book of Register of Copyrights and Assignments kept at the hall of the Stationers' Company in London, England, under the name of the Fatal Card, a Drama, and said play was again entered November 8th 1894 in the book of Register of Copyrights and Assignments kept at the hall of the Stationers' Company in London, England, under the name of the Fatal Card, Drama in Five acts, and that all said entries were duly made by the proprietor of the sole liberty of representation or performance of said play in accordance with the Acts of Parliament 5 & 6 Vict. C. 45.

THOMAS S. HOGAN,
Solicitor for Complainants.

42 And afterwards to-wit: on January 16th A. D. 1906 the same being one of the days of the January term of the Superior Court, the following among other proceedings were had and entered of record in said Court to-wit:

211760

CHARLES FROHMAN, CHARLES HADDON CHAMBERS and STEPHANO GATTI
vs.
RICHARD FERRIS.

Decree.

The Court having heretofore ordered this cause to be referred to Hiram S. Barber, one of the Masters in Chancery of this Court, to take and report evidence with his conclusions thereupon and the said Master having made report thereof to the Court and this cause coming on to be heard on exceptions filed herein by complainants to said Master's report filed herein November 29th, 1905, and said complainants being represented in open Court by their solicitors Hogan & Hogan and said defendant, Richard Ferris, being represented in open court by his solicitors L. E. Chipman and Charles H. Aldrich, and said cause being submitted to the Court on said report and the amended bill of complaint and the answer of the said defendant Richard Ferris thereto and the replication of complainants to said answer and the Court having heard the arguments of the solicitors for complainants and defendant, and having fully considered the same and the evidence contained in said Master's report, the Court finds:

That Charles Haddon Chambers and B. C. Stephenson in 1894 in London, England, invented and wrote a certain original melodrama in five acts to which they gave the name and title "The Fatal Card" and that said title was original with said authors and thereafter such conveyances, assignments and transfers were made and had that at the date of the filing of this suit the said com-
43 plainants Charles Frohman, Charles Haddon Chambers and Stephano Gatti were the sole and exclusive owners of said melodrama and that said melodrama has never been published or otherwise dedicated to the public in the United States of America or elsewhere, and that complainants have never surrendered or abandoned their common law rights in and to the said melodrama and the uses and benefits thereof in the United States of America, and that said complainants have throughout the United States of America the sole and exclusive right to publicly represent and perform and to cause said melodrama to be publicly represented and performed in theatres and other places of amusement.

The Court further finds that after said Chambers and Stephenson had written their said melodrama and named it "The Fatal Card," one George E. MacFarlane wrote a certain play to which he gave the name "The Fatal Card" and which said play the said George E. Macfarlane transferred to the said defendant Richard Ferris and the said defendant during the year 1900 and prior to the filing of this suit, procured said MacFarlane play to be copyrighted under the laws of the United States of America as copyright number 20539, and thereupon the said defendant proceeded to advertise and per-

form said MacFarlane play in various places of amusement in many of the large cities throughout the States of Ohio, Louisiana, Tennessee, Illinois and other States with large profits to himself and to the financial injury and detriment of complainants, all of which
44 was done with full knowledge of complainant's rights in the premises and without their consent; the court further finds that the said MacFarlane play is greatly inferior to complainant's melodrama and is a pirated copy of complainants' said melodrama, and by taking the name of complainants' said melodrama and using it as the name and title of the said MacFarlane play, the said defendant intended to and did deceive the theatre-going public into believing that his said play was the melodrama of complainants to the great injury of the theatre-going public and these complainants.

The Court further finds that the said defendant Richard Ferris, alias Dick Ferris, his agents and employees, should be forever restrained and enjoined from leasing, renting, licensing, advertising, selling, producing or performing complainants' said melodrama "The Fatal Card" or any copy thereof under the name of "The Fatal Card" or under any other name and from in any manner using or causing others to use the said name "The Fatal Card" as the name or title of any play or drama, and from in any manner using, renting, leasing, licensing, advertising, selling, producing or performing or causing or permitting any other person, firm or corporation to lease, rent, license, advertise, sell, produce or perform the said MacFarlane play or the said defendant's copyrighted play hereinbefore referred to for any purpose whatever.

The Court further finds that it has jurisdiction of the parties to this suit and the subject matter of this cause and that the
45 equities in this suit are with the complainants, and that the allegations in complainants' amended bill have been substantially proven and that the complainants are entitled to the relief prayed in their said amended bill and that all of said Master's said report not inconsistent with the findings of this Court in this decree should be and the same is hereby approved and confirmed.

It is therefore ordered, adjudged and decreed by the Court; that Charles Frohman, Charles Haddon Chambers and Stephano Gatti at the time of the commencement of this suit, to-wit; January 18, 1901, were the sole owners of the melodrama "The Fatal Card" invented and written by said Chambers and Stephenson, and that said melodrama "The Fatal Card" has never been published or otherwise dedicated to the public in the United States of America, and that said complainants had at that time the sole and exclusive right to represent and perform and to allow others to represent and perform said melodrama "The Fatal Card" and to otherwise use and enjoy the same.

It is further ordered, adjudged and decreed; that the said defendant Richard Ferris, alias Dick Ferris, render to said complainant within 60 days of the date of the entering of this decree, a true and correct amount of all public performances of the said MacFarlane play "The Fatal Card" given under the direction and management of the said Richard Ferris, together with a true and correct account

of all the profits, rents, issues, income and royalties received by said defendants, either through renting or leasing said play "The Fatal Card" or through the performance thereof.

46 It is further ordered, adjudged and decreed that the preliminary injunction heretofore issued in this cause be and the same is hereby made permanent, and the said Richard Ferris, alias Dick Ferris, his agents and employees, be and they are hereby perpetually enjoined and restrained from in any manner leasing, renting, licensing, advertising, selling, producing, representing or performing complainants' said melodrama "The Fatal Card" or any copy thereof or the MacFarlane play "The Fatal Card" or any copy thereof, under the name of "The Fatal Card" or under any other name and from in any manner using or causing others to use said name "The Fatal Card" as the name or title of any play or drama, and from in any manner using, renting, leasing, licensing, advertising, selling, producing, or performing or causing or permitting any other person, firm or corporation to lease, rent, license, advertise, sell produce or perform the said MacFarlane play or the said defendant's copy-righted play hereinbefore referred to for any purpose.

It is further ordered, adjudged and decreed by the Court that all of said Masters' report not inconsistent with the findings in this decree be and the same is hereby approved and confirmed.

It is further ordered, adjudged and decreed; that complainants have and recover their costs herein which are hereby taxed at $135.00 and that complainants have execution therefor and that any of the parties to this suit may return to this court and ask and on proper showing receive assistance from the Court in the enforcement of this decree.

47 And thereupon the defendant Richard Ferris prayed an appeal in open court to the Appellate Court in and for the First District which was allowed by the Court, the said Ferris to file a bond conditioned according to law in the penal sum of two hundred dollars, and the certificate of evidence within ninety days from this date.

And afterwards to-wit on the 28th day of February A. D. 1906, a certain Certificate of Evidence was filed in the office of the Clerk of said Court in words and figures following to-wit:

STATE OF ILLINOIS,
County of Cook, ss:

In the Superior Court of Cook County.

Gen. No. 211760. Term No. 6508.

CHARLES FROHMAN, CHARLES HADDON CHAMBERS and STEPHANO GATTI, Complainants,
vs.
RICHARD FERRIS and FRED J. WILDMAN, Defendants.

This was a bill brought by the complainants, Charles Frohman, Charles Haddon Chambers and Stephano Gatti, against the defend-

ants, Richard Ferris and Fred J. Wildman, to restrain the said defendants from producing, or causing to be produced a play called "The Fatal Card."

An answer was filed on behalf of the said Richard Ferris, and a disclaimer in behalf of the said Fred J. Wildman. A replication was duly filed to the answer of the defendant Ferris, and the cause was referred to Master in Chancery Hiram Barber to take evidence and report his conclusions thereon to this court.

48 Testimony was taken and a hearing was had before the Master, and the Master prepared and filed his report, with the objections and exceptions taken thereto; and the cause coming on to be heard by the court, the same was re-referred to the said Master to take further testimony herein and to re-state his findings of fact and conclusions of law upon all the evidence submitted.

Whereupon certain proceedings were had, as are reported in the final report of the Master, filed on November 9, 1905, which are as follows:

STATE OF ILLINOIS,
County of Cook, ss:

In the Superior Court of Cook County. In Chancery.

CHARLES FROHMAN et al.
vs.
RICHARD FERRIS et al.

Supplemental Report of Hiram Barber, Master.

To the Honorable Judge of said Court, in Chancery Sitting:

I, Hiram Barber, one of the Masters of said Court having been directed by an order of re-reference entered in said cause on the — day of —— A. D. 190—, to take further testimony herein and restate my findings of facts and conclusions of law upon all the evidence submitted respectfully beg leave to report.

That on the 26th day of January A. D. 1904 there was introduced and submitted in evidence before me on a hearing, under said order of re-reference on behalf of said complainants in said cause.

49 1st. A transcript of that portion of the evidence submitted before me on the original hearing of the said cause relating to the identity of the so-called complainants' play, and the so-called defendant's play, mentioned and described in the pleadings herein;

2nd. Complain-ts' Exhibit "A" filed January 15th A. D. 1901.

3rd. Deposition of Charles Frohman filed herein October 7th, A. D. 1901.

4th. Deposition of Charles Frohman filed herein November 23rd, A. D. 1901.

5th. The depositions of Stephano Gatti, Charles Stephenson and Charles Haddon Chambers filed herein October 2nd, A. D. 1902.

6th. The defendant's Exhibit one (1) in two parts, filed herein January 28th, A. D. 1901.

All of which items of documentary evidence are attached to the original report filed by me in this Court on January 26th, A. D. 1903.

And I further report that on the hearing last aforesaid there was also introduced before me on behalf of said complainants, the additional depositions of Charles Robert Rivington, Stephano Gatti and Benjamin Charles Stephenson, taken under a commission issued out of this honorable Court on the 22nd day of July A. D. 1903; and which said last mentioned depositions were filed in this Court on the 21st day of November 1903. That said last mentioned depositions comprise all the additional evidence submitted in said cause under said order of re-reference on behalf of either party.

50 1.

Statement.

It appears from the record that this is a suit brought by the complainants Frohman, Chambers and Gatti against the defendants Richard Ferris and others, to restrain the representation of a play entitled "The Fatal Card" a melodrama in five acts; that a preliminary injunction without notice to the defendants was issued upon the filing of the original bill herein on January 18th A. D. 1901. The defendants filed their answer to said original bill on January 28th A. D. 1901. The defendants also on March 11th A. D. 1901, filed the affidavit of the defendant Ferris in support of his motion to dissolve said preliminary injunction. On June 11th A. D. 1902, the complainants, with leave of Court, filed herein their amended Bill of Complaint.

Bill of Complaint.

The complainants in their said amended bill of complaint allege that the complainant Charles Frohman is a theatrical manager engaged in very extensive theatrical enterprises throughout the United States and other countries; that the complainant Charles Haddon Chambers is a playwright by occupation and the author and composer of many successful plays; that the complainant Stephano Gatti is by occupation a theatrical manager in the City of London; that the defendant Richard Ferris is a "Theatrical man" engaged in the business of owning and leasing plays, and that the defendant Fred J.
51 Wildman is a theatrical agent engaged in the business of buying, selling and leasing plays. That in 1894 said Chambers and one Stephenson, who was also a dramatic author and playwright, collaborated in the composition of the play in question, and that said play was original with said Chambers and Stephenson, and was of great value to them to-wit: "The sum of many thousands of dollars." That the said play was written in manuscript form and has never been printed, published or in any

manner dedicated for public use. That said play, however, has been publicly performed by the owners thereof on their lessees.

Complainants further allege that on April 30th A. D. 1894, and before the writing of said play, the firm of A. & S. Gatti, by contract with said Chambers and Stephenson became entitled to an equal one-third interest in all royalties derived from said play in the United States. That said A. Gatti as surviving members of said firm of A. & S. Gatti, is entitled to the benefit of said contract.

Complainants further allege that about June 13th, A. D. 1894, and before said play had been written, said complainant Frohman by contract with said authors and with the consent of said A. & S. Gatti, purchased an option on said play for the sole and exclusive American rights thereof.

That afterwards to-wit: on or about March 25th 1895, the said complainant Charles Frohman became the owner of the interests of said Stephenson in said play in manuscript aforesaid, with the exclusive right to produce, perform and represent the same in the United States of America and Canada.

That said Play has been extensively produced in the principal cities of the United States and Dominion of Canada under the personal supervision of said Frohman and was artistically and
52 financially successful, that in order to make said play successful the said Frohman laid out and expended divers large sums of money, amounting to thousands of dollars, in advertising and representing said play in public performances, and that said play is highly artistic, popular and meritorious, and has met with the approval of the press and the theatre going public, and has been a source of great gains and profits to the complainant; that after the purchase by Frohman of his interest as above set forth, there was written by one George E. MacFarlane what is claimed to be a new and independent play, also called "The Fatal Card", a melodrama in five (5) acts.

The complainants further allege that said play so produced by said MacFarlane is almost a verbatim et literatu, copy of the play owned by the complainants; that it contains substantially the same number of acts, scenes, plots and characters as the play of the complainants, with the exception of a few immaterial dialogues which appear in McFarlane's play; that while the names of the characters are different, the respective parts taken by each is the same in both plays; and while the plot of complainant's play is laid in Colorado and Cookham, England, that of the McFarlane play is laid in Boston, Massachusetts, California and the Klondike.

Complainants further allege that in 1898 the said George E. McFarlane conveyed and assigned his interest in said play so produced by him to said defendant Richard Ferris, and that in 1900
53 said Richard Ferris under the name of "Dick Ferris" made an application for and secured and obtained a copyright under the laws of the United States, number 20539, for the McFarlane play under the name and title of "The Fatal Card" and that said Ferris and the defendant Fred J. Wildman, acting as his agent, have made contracts with many managers of theatres and stock

companies in various cities of the United States for the production of said play, and have caused the said play to be publicly performed, collecting large sums in admission fees, and have publicly advertised the said play in catalogues and circulars as the property of said Dick Ferris, and that under the management of the said Ferris and Wildman the said play has been successfully produced in numerous public theatres in the principal cities of the United States, and that said circulars contain a warning to managers of theatres that all rights to the said drama are protected by said copyright, and that all unauthorized productions would be prosecuted for infringement.

Complainants further allege that all of said actions and doings by the defendant were done by them with full knowledge of the complainant's rights in the premises, and without the authority or consent of complainants. That the defendants have induced the public to attend the performances of their play under the belief and impression that it is the play of the said Charles Frohman and his associates; that the income and profits from the production of said play by the defendants was divided between the defendants Ferris and Wildman; that the defendants are continuing to license announce and advertise the said play at cheaper and less rates
54 than the complainants, and are producing said play in a less artistic form than the complainants, and are thus causing complainants a loss in their profits amounting to thousands of dollars.

Answer.

The defendants by their answer and affidavit traverse the exclusive rights claimed by complainants, and also deny that the two plays mentioned in complainant's bill of Complaint are substantially identical, and affirmatively allege that the contract between McFarlane and Ferris was made on July 29, 1900, and that about the same time, in fulfillment of said contract, Ferris bought McFarlane's right, title and interest in said play for the sum of $140.00 paid to McFarlane; that Ferris made the purchase in the utmost good faith, and without the knowledge upon his part of any of the alleged rights of the complainants, or any or either of them, and that he believed that he had a good and lawful right to purchase the play from McFarlane; that he obtained a copyright on August 16, 1900; that afterwards he entered into said business relations with said defendant Wildman and gave public notice to all theatre managers and stock companies of his rights under the copyright, and warning them that they would be prosecuted for infringement of his rights in the play; that he expended large sums of money in advertising said play and entered into contracts with many actors and actresses to produce and represent said play in the smaller towns of the western portion of the United States, and purchased large amounts of printing material to advertise the play; that if the injunction
55 is not dissolved, he will be totally ruined and utterly unable to fulfill many contracts for the representation of the play and will be made defendants in many law suits by reason of nonfulfillment of said contracts he having "guaranteed to them protec-

tion from any interference whatever in the production and representation of the said McFarlane play." That he made it well known to all parties that his play was the play purchased from McFarlane; that he has exercised acts of ownership over the same and has never asked the consent or authority of the complainant, and has never done anything at any time to cause or to leave the impression upon the minds of the public that the play he was producing was the one claimed by the complainants, and that he never traded on complainants' reputation; that his expenses for producing the said play were largely in excess of his receipts and profits.

4.

History of Complainants' Play.

I am satisfied from the testimony submitted; and accordingly find the facts to be, that the complainant Chambers is a dramatic writer by occupation; that the said complainant Chambers and the said dramatic writer Stephenson were the joint authors of the said play called "The Fatal Card", claimed to be owned by complainants and particularly described in their said amended Bill of complaint; that said play was original with said Chambers and Stephenson, and was composed by them in London England, in the year A. D. 1894. That said play is a melodrama of decided literary merit, and of very considerable monetary value. That the same was first
56 publicly performed at the Adelphi Theatre in London on September 6th A. D. 1894, by A. & S. Gatti, with the consent of said Chambers and Stephenson, and that said play has not been published by the owners thereof, or by their licensees.

5.

Complainants' Interests.

I am of the opinion that the rights of complainant Frohman, in the play so produced by said Chambers and Stephenson under his original agreement with said authors were for the period of five (5) years, which period expired June 13th A. D. 1899.

It further appears from the testimony submitted however, and I accordingly find the fact to be, that on or about March 25th A. D. 1895, the complainant Frohman purchased all the interest of said Stephenson in the play in and for the United States. It is true no written assignment of such interest has been produced. The oral testimony, however, of both Frohman and Stephenson is very explicit on this point.

It further appears from the testimony submitted, and I find the facts to be, that the complainant Chambers, has never parted with his interest in the play so produced by himself and said Stephenson, excepting as the same may have been transferred by the original contract between said authors and said A. & S. Gatti and the subsequent contract with the complainant Frohman which has expired

—and I am therefore, of the opinion that the complainants Chambers and Frohman have an equal joint interest in the earnings of the play.

57 I am also under the opinion that under the original contract by Chambers and Stephenson with the firm of A. & S. Gatti, the complainant S. Gatti, as the surviving partner of the firm of S. & A. Gatti, has a direct monetary interest in the earnings of the play.

6.

Identity of Plays.

A comparison of the complainants' play with the play claimed by the defendants with respect to the cast of character, the plot, acts and scenes, shows the following:

Complainants' Play.

Cast of Characters.

Gerald Austen—Son of A. K. Austen. (25)
George Forrester—Afterwards Marrable, the father of Margaret Marrable. (50)
Jim Dixon—Forrester's Confederate. (35)
Harry Burgess.
Terrence O'Flynn—Forrester's Confederate, but let at the "Cedars." (40)
A. K. Austen—Father of Cecil and Gerald, a stockbroker. (70)
Harry Curtis—Forrester's Confederate.
Sulky Smith—Forrester's Confederate.
Hiram Webster—Chief of the Vigilance Committee.
Cyrus Wackford—Clerk in a New York Broker's Office.
Dutch Winnigan.
Two Detectives—Bay Y. Harry, Open A. Jack. 14
Cattlemen (6)—Bar, Tom &c. Kid Williams &c.
Mike—(colored boy.)
Miners (6)—Dutch Winnigan, Bully Jack, &c.
Mexican (6)—Perrero Thomassa.
58 Margaret Marrable—Daughter of George Marrable alias Forrester. (20)
Mercedes—Afterwards Mrs. Arlington.
Cecil Austen—Austen's daughter and Gerald's sister.
Miss Penelope Austens—Sister to Austen and Cecil's Aunt.
Kate—Sings in the Rising Star Saloon.
Servant.
Maid.

Act. 1.

In the offices in Angel Court. Marrable's house.

Defendant's Play.

Frank Mason—A Young miner.
Charles Leslie—Alias Henry Hartman.
Richard Armstrong—Mason's friend.
Bud Mitchell—A bad man.
Jose Martinez—A vindictive Mexican.
Malachy Murphy—Leslie's left bower.
Abner Ramsey—Who represents the law.
Robert C. Mason—A Boston banker.
Arthur Edwards—A confidential messenger.
Vera Manchester—An adventuress.
Dorothy Mason—Frank's sister.
Ethel Leslie.
Miss Minerva Mason—Spinster.
Faro Nell—One of the many.
Dora—A scrub girl.

Doubles.

Bud Mitchell and Jose Martinez.
Abner Ramsey and Robert C. Mason.
Miss Minerva Mason and Faro Nell.

Complainant's Play.

"Act 1."

Scene 1.—The bar room in a saloon and Gambling House kept by Mercedes at "Rising Star" in a Mining district of Colorado.
59 It is night and the room is brilliantly lighted. On the left is a bar counter, behind which are shelves with bottles &c. behind the counter is a door, L. leading to a house; a door R. leading to gambling rooms and a looking glass cracked as if by a pistol shot. At the back is a door opening on to the street. To the right of the door is an old cottage piano forte and in the corner R back a stove around which are wine cases. Stools, table R and another table is placed L, below the bar counter two chairs—the seats are chiefly wine cases and broken chairs.

Discovered.—On the rise of the Curtain, half a dozen miners are seated around the stove. The Mexican is standing at the counter smoking cigarettes and drinking; Mike behind the bar is serving them. At the table R are seated Dixon Curtis and Smith playing poker. Two Cattlemen stand looking on at the game. Kate at the piano, O'Flynn is standing over her. She is playing a valse tune.

No. 1. Music at rise.

Scene.—The scene represents a view of the Rocky Mountains, through which the track of the Union Pacific Railway passes. In the front is a bank below which the railroad runs in a cutting. The telegraph pole stands out in the center, and the front of the scene

is in dark shadow. On the tops of the mountains in the distance the rising sun is reflected.

Discovered.—Forrester, Hiram, the Miners and Cattlemen, one Miner carrying a lantern—3 men holding the rope, L. For. is C. rope on neck. Hiram R. C. Men group around bank.

Defendant's Play.

"Act 1."

Scene.—A typical western bar-room. Set in 4. Bar from C to R. Piano on Platform L. Opposite and on line with bar. Table and chairs L in 1. Table and two chairs R in 1. Door LC. in Flat. Arch obliqued L. 3 E. Miners *ate* at table L playing cards. At rise of curtain general commotion and applause for song just completed. Through arch voice heard calling off Faro bets in a sing-song tone.

Disc.—Malacy Murphy standing R. C. Vera behind bar. Nell seated at piano. Jose Martinez standing at table R.

Scene Two.

Scene.—Full stage. Drop showing river with grove for profile steamer. Bank four or five feet high in front of drop, slowing down stage. Tree L in 3. Light blues on, to give moonlight effect. Hour before daybreak.

60 Disc.—Hartman bound. Remsey and Vigilantes Rope. Around Hartman's neck and over tree.

Complainant's Play.

"Act II."

Scene.—The lawn of Marrable's Villa on the Themes near Cookham. On the left is the house, the windows of the drawing room opening on to the lawn. On the right is the river, boats, punts, a canoe etc. It is a very bright summer afternoon.

Discovered.—At rise of curtain Cecy sitting L. C. and Burgess. Burgess is fanning Cecy, standing R. of Cecy's chair.

Defendant's Play.

"Act II."

Scene.—Charles Leslie's suburban restaurant retreat near Boston, Mass. Full Stage. Foliage drop at back. House with veranda and two steps. Obliqued from R 2 to R 4 E. Set tree L 2, Hammock extending from set tree off stage L. Low bench R L E.

Disc.—Miss Minerva Mason and Dorothy Mason. Dorothy in Hammock with embroidery. Minerva standing.

Complainant's Play.

"Act III."

Scene.—The stage represents on the one side L the offices of A. K. Austen, Stockbroker, on the other side R the office of Marrable, on the first floor of the house in Angel Court, Throgmorton St. In the center of the stage is a landing of a staircase which leads upstairs to the second floor and downstairs to the ground floor. The offices are furnished, Austen's very plainly, a large safe in one corner and a desk about C Marrable's more comfortable.

Enter Marrable C. up stairs first and Dixon following Marrable quietly opens the door of his office L and he and Dixon go in without speaking. Marrable puts the key into the inside keyhole and closes the door.

61 *Defendant's Play.*

"Act III."

Scene.—Divide stage to show three interiors. C. interior represents hall. Street entrance off R. C. arch. (See diagram) in upper flat. Maid enters and exits L. U. E. Hall set. (See diagram) Color of hall set should be buff. R interior light. Window with housetops for backing in upper flat. Practical door with lock and key in "L flat. Window with prac. shade in R flat between 2 and 3. L interior dark. Practical door with lock and key in R flat. Window in L flat 3. On practical door of R interior have sign that can be seen by audience reading "Edward Mason, Broker & General Dealer." On pract. door of L. interior—"Charles Leslie, Broker."

At rise Bud Mitchell and Leslie enter from R. C. stealthily, open L in 2. Enter and sit at table desk. Leslie looks nervously at watch and Mitchell helps himself to brandy on small table.

Complainant's Play.

"Act IV."

Scene.—Enter Burgess and O'Flynn R. over bridge. Burgess has a very lange bath towel in his hand and O'Flynn has letters and parcels which he is taking to the Postoffice. Fishing rod and basket.

Scene 2.—Drawing room of Marrable's villa. Comfortably furnished. At back is French window opening to the grounds and looking onto the veranda. The garden is seen at the back. Doors L leading to the entrance hall and staircase. Door E leading to the dining room.

Discovered.—Margaret and Mercedes entering L.

Defendant's Play.

"Act IV."

Scene 1.—Drop in two shows river and country beyond. River is covered by aquatic plants, and has wier or dam crossing at R. In front of drop is bank or run leading to wooden bridges which leads off stage. Bank fringed with bull rushes, reeds. Set tree in bank. At rise Murphy enters R carrying fishing tackle. Armstrong follows carrying towels.

62 Dark change.

Scene 2.—Reception room in Mr. Leslie's suburban home. Piano lamp R 3 E Doors R L & C. Enter Vera and Ethel at change from C. D.

Complainant's Play.

"Act V."

Scene.—A very plainly furnished room in the cottage. It is Marrabe labroatory. When the curtain rises the stage is dark and through the windows the audience gets a dim impression of a landscape outside.

Discovered.—Gerald and O'Flynn entering door L.

Defendant's Play.

"Act V."

Scene.—Plain chamber in 3. Doors 1 2 E and L 3 E. Six stairs leading up to landing are set R 2 E. Stairs are fitted with handrails and Newell posts at end of rails. Large square windows with sill 5 foot above floor. 6x6 foot glazed with small panes of practical glass. Practical door leads out onto landing R 2. It has lock and key. Table and 4 chairs down L-c. Chest 2x4x6 in chest. Rope ten feet long, Nine inch dirk knife Small leather bag. Enter Ethel and Frank at rise. Ethel has roses in her hair.

It thus appears from a comparison of the above headings in connection with the details that with the exception of a few immaterial changes in dialogue and scene, and in the change of the names of characters and geographical location, the defendant's plot follows that of the complainant, title for title, plot for plot, act for act, scene for scene, and in a great many instances, line for line and word for word.

I therefore find, as a matter of fact, that the McFarlane play for which the defendant Ferris obtained a copyright is substantially identical with the play claimed by the complainants, and
63 which is alleged by them to have been written by Chambers and Stephenson in the year A. D. 1894.

7.

Complainants' Common Law Rights.

It will be observed that the complainants base their claims of ownership in the present proceeding wholly upon their alleged common law rights; while the defendants set up rights claimed to have been acquired by them under the Copyright act of the United States.

At common law, an author has a property in his manuscript and may obtain redress against any one who deprives him of it, or who by improperly obtaining a copy endeavors to realize a profit by its publication, and there can be no doubt that the rights of an assignee of such manuscript would be protected by a court of chancery.

4. American & English Ency. of Law, and cases cited pg. 148.

If, therefore, the complainants have shown a proper title to the play claimed by them; that the same was produced by the alleged authors; and that there has been no publication thereof, then they are well within their common law rights as above stated, and the copyright obtained by the defendant Ferris as assignee of McFarlane will not avail as a defense to the charge of piracy and infringement contained in the bill of complaint, and the motion to dissolve must be denied.

I am of the opinion that the testimony abundantly shows that the play claimed by the complainants was composed by the
64 dramatic writers Chambers and Stephenson in England in the year A. D. 1894; that said play was original with said writers; that as a melodrama the play possesses great merit and has also a very considerable monetary value.

I am also of the opinion that upon the testimony submitted, the complainants must be considered as having a joint interest in the play produced by the said dramatic writers Chambers and Stephenson, and are therefore entitled to maintain their present Bill—unless their exclusive right in the play has been lost by dedication thereof to the public. It remains, therefore, to inquire whether the exclusive rights of ownership in the play are still unimpaired.

8.

Dedication Under English Statutes.

While at common law, the public representation of a play is not a publication thereof, this rule seems to have been changed in England by statute. In discussing the effect of a public production of a play upon the rights of the author in England, the Editor of the A. & E. En. of Law says: .

"In England this whole question as to the effect of a stage production of a drama has been put at rest by the copyright statute which declares that one public representation or performance of any dramatic piece is sufficient in the construction of the law to constitute a publication."

A. & E. En. of Law, Vol. 7 page 525, Note 2 (2nd Ed.)
65 Boucicault vs. Chatterton 5th Chancery Division, 257. From the case last cited it appears that by the statutes of England the public production of a dramatic piece is made equivalent to the production of a book. This provision was manifestly intended to put an end to actions for alleged infringement of an author's common law rights, after the public production of his play.

Production of Play in England.

It appears from the testimony submitted in the case that the said complainant's play "The Fatal Card" was first performed in England on September 6th, 1894;

That it was registered on Oct. 31st, 1894;

That it was re-registered on November 8th, 1894.

The first performance of the play in England was at the Adelphi Theatre in London. This production was made in pursuance of the contract between the authors and the firm of A. & S. Gatti.

10.

Production of Play in America.

It further appears from the testimony submitted that the authors of the play in question were at the date of its composition and still are residents of England, and while such residents entered into a contract with the defendant Frohman giving him the exclusive rights to the production of said play in the United States for a period of five years. The date of Frohman's contract was June 13, A. D. 1894, and the same therefore expired on June 13, A. D. 1899, and prior to the filing of the complainant's bill herein. His rights therefore as complainant depend upon his purchase of Stephenson's interest in the play, which was made on March 25, A. D.
66 1895, and subsequent to the first public performance of the same. That during the life of said contract the said complainant Frohman, in the exercise of his rights thereunder, caused said play to be extensively represented in various parts of this country.

11.

Effect of Stage Production in England.

Under the English statutes, therefore, the authors of the play in conjunction with the complainant Frohman are by this proceeding to be regarded as having made a voluntary publication of the play on September 6, A. D. 1894. This being the case, it is clear that the present bill of complaint could not be maintained in England, and it may well be claimed that the same cannot be maintained here. While it is true that the English statute does not operate in this country, it is nevertheless the fact that the complainants have done that which constitutes a publication of the play in England, and

this fact is binding upon them here as well as there. In the nature of things there can be but one publication of a literary production by the author thereof.

"Common law rights of authors run only to the time of the publication of their manuscripts with their consent. * * * It is immaterial whether the publication be made in one country or another."

25 Fed. Rep'r 184.

Conclusions.

1. A play is undoubtedly personal property.

Drone on Copyright, page 104.

Scrutton on Copyright, page 127.

Like all other personal property it is governed by the lex domicilia.

Owing to its peculiar character as personal property it is com-
67 petent for the legislative authority to put limitations upon its duration and use. It is because of this fact that under the copy-right laws the terms of private enjoyment are so limited. And from the same principle it becomes competent for the legislature to say that a performance shall be equivalent to a publication. The statute 5 & 6 Vict. sec. 20, declares that the first presentation of a play shall operate as the first publication of a book. After the first performance of "The Fatal Card" all the rights of the owners were derived from that statute, and that of the 3 & 4 Will. IV, providing for copy-right.

MacGiliveray Law of Copyright, page 36.

Drone on Copyright, page 576.

These authorities seem to hold that where there is a publication under the statute in England the common law right ceases and the statutory copy-right vests provided there has been a compliance with the provisions of the copyright law. The conclusion of these text writers seems to be amply supported by the opinions of the English Courts to the effect that the author's common-law rights run only to the time of publication.

Boucicault v. Delafield, 1 Ham. & N. 597.

Boucicault v. Chatterton, 5 C. D. 257.

2. It appears from the certified transcripts attached to the deposition of Rivington that the methods by which an author secures to himself the protection of a copy-right in England is the entry of his play in the Hall of Stationers' Company in London. In this entry the date of the first representation of the play is set forth.

The process is certainly a very simple one and by*t* it it seems to be clear that the common-law rights of the author in the play are absolutely extinguished in the Kingdom of Great Britain.

68 When, therefore, the play "The Fatal Card" was entered at the Hall of the Stationer's Company on the 31st day of October A. D. 1894, the common-law rights of the authors Chambers and Stephenson in said play became thereupon extinguished throughout the Kingdom of Great Britain.

The solicitors for the complainants, however, contend that the common-law rights of these authors in said play in America remain undisturbed and that they are entitled to assert such rights notwithstanding the extinguishment of their common-law rights in England. The learned counsel for the complainants rely upon three American cases to sustain their contention, to-wit:

Crowe v. Aiken, 2 Biss. 208.
Palmer v. DeWitt, 47 N. Y. 533.
Tompkins v. Halleck, 133 Mass. 32.

The opinion in Crowe v. Aiken was rendered in January A. D. 1870. The English statute had not received at that time the construction given it by the court in Boucueault v. Chatterton, 5th Chancery Div. L. R. 267. The opinion in that case was not rendered until 1876. It is apparent therefore that Judge Drummond could not have had in mind the effect of the broad construction of the statute subsequently adopted by the English courts.

An examination of these cases however, fails to show such a state of facts in either case as would appear to render the opinion therein controlling in the case at Bar.

And in this connection it is to be observed that the facts in Crowe v. Aiken, 2nd Bis. 208, are not clearly set forth and it is, therefore, difficult to determine the scope or value of Judge Drummond's
69 opinion. In the Reporter's statement of the case the complainant is represented as the owner of a copy-right of the play. When and where and how he obtained this copy-right does not appear. In Judge Drummond's opinion it would appear that the play was written for the complainant by the author thereof, Tom Taylor and that when completed an interest was transferred by assignment to the complainant. It is not entirely clear what this interest was. It was for the period of five years. Whether the interest was for anything more than the right to represent the play in the United States, is not certain. Whether Taylor, the author, retained the ownership of the play for the Kingdom of Great Britain does not clearly appear. The inference, however, is strong that he did, and that the interest so assigned to the complainant was an exclusive right to represent the play in the United States for the period of five years. After the transfer of the interest to the complainant, the play was represented in England, but by whom does not appear; whether with the consent of the complainant or with the consent of the author, Tom Taylor, is not stated. If by the author Taylor it was after the transfer to the complainant of the exclusive right to play in the United States; and of course, under these circumstances the representation in England would have no effect upon the rights of the complainant in the United States as the assignee of the author Taylor; and Judge Drummond's opinion, based upon the theory of the common-law would be entirely in order. It certainly does not appear from the statement of the facts that the complainant Crowe was the owner of the entire play, and that the same was repre-
70 sented in England with his consent before it was represented in New York. In this state of uncertainty as to the real facts

in the case, the opinion in Crowe v. Aiken cannot well be considered as controlling in the case at Bar.

In the case of Palmer v. DeWitt, 47 N. Y. 532, replied upon by the complainant's solicitors, Robertson, the author made an assignment of an exclusive right in the United States to the complainant, on February 1st 1868. The play was subsequently represented at Princess' Theatre, London on February 15th, 1868, and many times thereafter. Of course, the representation of the play at Princess' Theatre in London on February 15th 1868, and after the transfer of an exclusive interest in the play in the United States had been made could not have any effect upon the right of the complainant in that case.

In the case of Tomlins v. Halleck, 133 Mass. 32, which the complainants' solicitors regard as a very strong authority in their favor, the question of the effect of the representation in London does not appear to have been considered. The whole scope of the opinion in this case seems to be a review of the earlier decisions of the same court in Keane v. Kimball, in 16 Gray, which was rendered in November, 1860.

3. Under the circumstances disclosed by the record, I am therefore of the opinion that the complainants have failed to establish an exclusive right to produce the play described in their bill of complaint in the United States, and that the prayer of said complainants' bill should be denied and the same dismissed.

All of which is respectfully submitted.

Dated Chicago, April 3rd, 1905.

HIRAM BARBER,
Master in Chancery, Superior Court, Cook Co.

71 Master's Fees as per schedule. $

And I further report that afterwards to-wit on the 14th day of April A. D. 1905 sundry objections to the foregoing findings of facts and conclusions of law were filed with me on behalf of as well said complainants as the said defendants.

That afterwards to-wit on the 27th day of April A. D. 1905 on notice to the solicitors of the respective parties, the said objections, upon consideration thereof, were overruled, and disallowed, and the same endorsed accordingly are herewith returned.

All of which is respectfully submitted.

Dated Chicago April 27th A. D. 1905.

HIRAM BARBER,
Master in Chancery, Superior Court, Cook County, Illinois.

Master's fees as per schedule. $

FROHMAN
v.
FERRIS.

Docket Entries.

1901.
Feby 20th. Ctd.
Mar. 25th. Testy. Argument by Mapledorum.
Mar. 28th. Argument by Mapledorum.
June 12th. Argument.
June 19th. *Cdt.*
June 25th. Final argument.
Sept. 4th. Complt's time to submit proofs extended.
1902.
Jan. 16th. Rule on complt to close proofs in 30 days.
Feb. 14th. 30 days additional time to take depositions.
Apr. 7th. Sundry depositions submitted in evidence on behalf of complainant. Proofs for complainant declared closed. Motion by defendant that Master recommend dissolution of preliminary injunction.
72 Apr. 14th. Ctd.
May 6th. Ctd.
May 13th. Ctd.
June 23rd. Argument.
June 25th. Ctd.
June 27th. Arguments.
June 30th. Ctd.
July 2nd. Arguments.
July 9th. Arguments closed.
Nov. 5th. On—Objections—overruled.

Gen. No. 211760.

FROHMAN ET AL.
v.
FERRIS ET AL.

(Copy from Original Report.)

Master's Statement.

Master's Statutory fee for taking 218 pages of testimony. $81.00

Additional Services.

1. Examination of pleadings,.....
2. Comparison of plays,.....
3. Examination of depositions,.....
4. Arguments, ...
5. 20 days' time (A. D. 1901) in preparing original draft of report,.....

6. Hearing and order on motion to re-open case,.....
7. 10 days' time (in A. D. 1902) in preparing final draft of report,.....
8. Notices.
9. Ruling on objections to report,.....
While amount claimed for additional services,..... $344.00

Total Master's fees,..... 425.00

73 Dated January 26th, 1903.

(Copy) HIRAM BARBER,
Master in Chancery, Superior Court,
Cook County, Illinois.

FROHMAN
vs.
FERRIS.

Under Order of Re-Reference.

Docket Entries Continued.

Jan. 26, 1904.—Complainant produces depositions and declares proofs closed.

April 28, 1904.—Rule on defendants to close proofs in 14 days from this date.

Feb. 15, 1905.—All proofs declared closed.

Apr. 3, 1905.—Arguments.

Apr. 27, 1905.—Objections to supplemental report overruled.

April A. D. 1905.

Additional Services.

1. Re-examination of Original report.
2. Examination of additional testimony.
3. Arguments.
4. Re-examination of authorities.
5. Preparation of supplemental report, in all eleven (11) days time for which the amount claimed is $150.00.

Balance due Master, $275.00.

Sept. 20th, 1905.—Paid by defendant.

HIRAM BARBER,
Master in Ch'y.

Together with the objections filed before said Master on behalf of the complainants which are as follows:

74 STATE OF ILLINOIS,
County of Cook, ss:

In the Superior Court of Cook County.

Gen. No. 211750, Term No. 6508.

CHARLES FROHMAN et al., Complainants,
vs.
RICHARD FERRIS et al., Defendants.

Now come the above named complainants by Thomas S. Hogan their solicitor and file the following objections to the report of the Master herein, dated the third day of April 1905 and which said objections are as follows:

(1) Complainants object to so much of said Master's report as finds that there was a production of complainant's play "The Fatal Card" in England within the meaning of the law so as to constitute a bar to the relief asked for in complainant's bill.

Whereas the said Master should have found that there was no publication of complainant's play in England sufficient to act as a bar to this proceeding, and further the said Master should have found that said complainant Charles Frohman has always been a resident of the State of New York from the date of the composition of said play down to and including the date of the filing of this suit and that said Frohman was not bound by the alleged English publication of said play.

75 (2) Complainants object to so much of said Master's report as finds that "under the English statutes the authors of the play in conjunction with the complainant Frohman are by this proceeding to be regarded as having made a voluntary publication of the play on September 6th A. D. 1894 — and that the complainants have done that which constitutes a publication of the play in England and this fact is binding on them here as well as there."

Whereas the said Master should have found that the said complainant Charles Frohman did not act in conjunction with the authors of said play and that he is not by this proceeding regarded as having made a voluntary publication of the play on September 6th A. D. 1894, and the said Master should have further found that the complainants have not done that which constitutes a publication of the play in England, and that the record in this case does not disclose such a state of facts as would constitute a publication of the play in the United States of America.

And said master should have further found that the said complainant Charles Frohman is not bound in this proceeding by any of the English statutes applicable to the facts disclosed by the record in this case.

(3) Complainants object to so much of said Master's report as finds that "after the first performance of the Fatal Card all the rights of the owners were derived from that statute (5 & 6 Vict. Sec. 20) and that of the (3 & 4 Will. Iv.) providing for copy-right."

Whereas the said Master should have found that the said English statutes have no extra territorial force and do not affect the
76 rights of the complainants, or any of them, within the United States of America and that the complainant's rights and particularly the rights of said Charles Frohman in this proceeding are governed and determined only by the law as it exists in the United States of America.

(4) For that the said Master in and by his said report found that "the common law rights of the authors Chambers and Stephenson in said play became thereupon extinguished throughout the Kingdom of Great Britain.

Whereas the said Master should have found that the common law rights of the authors Chambers and Stephenson in said play did not become extinguished throughout the Kingdom of Great Britain when the said play "The Fatal Card" was entered at the Hall of Stationers' Company on the 31st day of October A. D. 1894.

(5) For that said Master in and by his said report as one of his conclusions found "that the complainants have failed to establish an exclusive right to produce the play described in their bill of complaint in the United States and that the prayer of said complainants' bill should be denied and the same dismissed.

Whereas the said Master should have found in and by his said report that the complainant and particularly the said Charles Frohman have established in and by the record in this case an exclusive right to produce the said play described in said bill of complaint in the United States and that the prayer of complainants' bill should be granted.

(6) For that said Master in and by his said report has found that the play "The Fatal Card" was by the authors and owners thereof dedicated to the public in Great Britain at and prior to the
77 time when the said Charles Frohman acquired an interest in said play and that said alleged dedication of said play in Great Britain operates as a dedication of said play in the United States of America, and that by virtue of said alleged dedication the said play became public property in the United States of America, and that the said complainant, or either of them, have no right to maintain the bill filed in this case.

Whereas said Master should have found in his said report that there was no dedication of said play in Great Britain at any time and that the common law rights of complainants to said play had not been taken away, in whole or in part, by said English statutes, and that said alleged dedication did not in any wise operate as a dedication of said play in the United States of America, and that all of complainants' rights, especially the rights of said Charles Frohman to said play are secured by the common law of the United States and that if any rights of complainants to said play in England were taken away from them by the Statutes of Great Britain, those statutes have no extra-territorial force or effect within the United States of America and that the alleged dedication of said play in England, if there was a dedication, was confined to the territorial limits of Great Britain.

(Signed) THOMAS S. HOGAN,
Sol. for Comp'ts.

In view of the fact that the said objections and exceptions raise no questions of fact to be decided by the court, and as there is
78 no question of admissability, sufficiency or weight of the evidence, but that the said exceptions and this certificate of evidence are preserved merely to present the questions of law arising from the ultimate facts clearly established by the evidence, and undisputed upon the record, the exhibits and depositions attached to the said Master's report are omitted.

And this cause came on to be heard, and was argued by counsel for the respective parties and counsel for both complainants and defendants stated to the court that there was no question of fact involved, but only the question of law arising from the ultimate facts clearly established by the evidence, which questions of law only were raised by the objections and exceptions to the said Master's report.

And thereupon the court held that in so far as the exceptions raised the questions of law as to the effect of the production of the said play "The Fatal Card," on September 6, A. D. 1894, upon the complainants' rights in this country, that the same would be sustained, and the Master's report in so far overruled, that notwithstanding the copyright in England and the public performance there, the Master was in error in holding as he did upon the law of the case, and that the owners of the play had common law rights in the United States, and that the complainants were entitled to a permanent injunction as prayed in their bill, and that the same should be and was granted. To which holding and ruling the defendants duly excepted. Complain-ts objects to the signing of this certificate. Wherefore it tenders this its certificate this 28th day of February A. D. 1906.

JOSEPH E. GARY, *Judge*.

79 And afterwards to-wit on the 5th day of March A. D. 1906 a certain Appeal Bond was filed in the office of the Clerk of said Court in words and figures following to-wit:

Know all Men by These Presents: That we Richard Ferris of the City of Minneapolis and State of Minnesota as principal and Elsie Horg surety of the County of Cook and State of Illinois, are held and firmly bound unto Charles Frohman, Charles Haddon Chambers and Stephano Gatti in the penal sum of Two Hundred Dollars lawful money of the United States, for the payment of which well and truly to be made we bind ourselves, our heirs, executors and assigns, jointly, severally and firmly by these presents.

Witness our hands and seals this 3rd day of March A. D. 1906.

The condition of the above obligation is such that whereas on the sixteenth day of January A. D. 1906 a decree was entered by the Honorable Joseph E. Gary, Judge of the Superior Court in and for the County of Cook, State of Illinois enjoining the above bounden Richard Ferris and Fred J. Wildman from which said decree the said above bounden Richard Ferris has prayed for and obtained an appeal to the Appellate Court within and for the First District of the State of Illinois.

Now therefore if the said Richard Ferris shall duly prosecute his said appeal with effect and moreover answer all costs which may be rendered against him in case the said decree shall be affirmed in said Appellate Court, then the above obligation to be void, otherwise to remain in full force and virtue.

RICHARD FERRIS. [SEAL.]
ELSIE HORG. [SEAL.]
[SEAL.]
[SEAL.]

Approved:
ROYAL E. GARY, *Judge.*

80 STATE OF ILLINOIS,
County of Cook, ss:

Elise Horg being first duly sworn deposes and says that she is the owner of the property known as 3157 Milwaukee avenue in the City of Chicago, Cook County, Illinois and that the same is worth the sum of Eight Thousand dollars subject to an encumbrance of $2300 and that she is worth the sum of six thousand dollars over her debts and liabilities.

ELISE HONG.

Subscribed and sworn to before me this 3rd day of March A. D. 1906.

[SEAL.] LEWIS E. CHIPMAN,
Notary Public.

And heretofore to-wit on the 28th day of February A. D. 1906 a certain Præcipe was filed in the office of the Clerk of said Court in words and figures following to-wit:

STATE OF ILLINOIS,
County of Cook, ss:

In the Superior Court of Said County.

Gen. No. 211760, Term No. 77.

CHARLES FROHMAN, CHARLES HADDON CHAMBERS, and STEPHANO GATTI, Complainants,
vs.
RICHARD FERRIS and FRED J. WILDMAN, Defendants.

To Charles W. Vail, Esq., Clerk of said Court.

SIR: The Clerk will please prepare a transcript of record in the above entitled cause, including the following items to-wit:

81 Summons issued January 18 1901.
Amended bill of complaint filed June 11 1902.
Amended answer of Richard Ferris, defendant, filed April 22 1901.

Stipulation, filed June 16 1902.
Amendment to answer of Richard Ferris, defendant filed March 27 1903.
Replication of complainants, filed Nov. 25, 1903.
Amendment to amended bill of complaint, filed February 18, 1905.
Decree filed Jany. 16 1906.
Certificate of evidence filed February 28 1906.
4 Bond-filed March 5 1906.

Respectfully,

L. E. CHIPMAN.
ALDRICH & McAULEY.

211760/77. In the Superior Court of Cook Co. In Chancery. Chas. Frohman et al. v. Richard Ferris et al. Præcipe. Filed Feb. 23, 1906. Chas. W. Vail, Clerk. L. E. Chipman, Aldrich & McAuley, sol'rs for defendant.

STATE OF ILLINOIS,
County of Cook, ss:

I, Charles W. Vail, Clerk of the Superior Court of Cook County in and for the State of Illinois, and the keeper of the records,
82 files and seals thereof, do hereby certify the above and foregoing to be a true, perfect and complete transcript of the Record as per præcipe on file herein in a certain cause lately pending in said Court on the Chancery side thereof wherein Charles Frohman et al were complainants and Richard Ferris et al were defendants.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court at Chicago this 5th day of March A. D. 1906.

[SEAL.] CHARLES W. VAIL, *Clerk.*

Record contained 20010 words ¢ 10¢ per 100..... $20.01
Certificate ..... .50

20.51

ALFRED R. PORTER, *Clerk.*

STATE OF ILLINOIS,
County of Cook, ss:

In the Appellate Court of Illinois. First District, March Term A. D. 1906.

Gen. No. 211760, Term No. 6508.

RICHARD FERRIS, Appellant,
vs.
CHARLES FROHMAN, CHARLES HADDON CHAMBERS, and STEPHANO GATTI, Appellees.

Assignment of Errors.

And now comes the said Richard Ferris, by L. E. Chipman and Aldrich & McAuley, his solicitors, and says that in the record and proceedings aforesaid there is manifest error in this, to-wit:

I. That the court erred in finding the issues herein in favor of the appellees and against this appellant.

83 II. That the said Court also erred in enjoining said appellant from producing, or causing to be produced, the play "The Fatal Card."

III. That the court erred in holding that the appellees had the sole liberty of producing, or causing to be produced, the play The Fatal Card" in the United States.

IV. That the Court erred in the hearing hereof in entering the decree herein entered.

By reason whereof the appellant pr-ys that said judgment may be reversed, etc.

RICHARD FERRIS,
By L. E. CHIPMAN AND
ALDRICH & McAULEY,
His Solicitors.

In the Appellate Court, First District, Illinois.

No. 12928.

RICHARD FERRIS, Appellant,
vs.
CHARLES FROHMAN et al., Appellees.

Appeal Cook Superior. Error Cook.

I, Alfred R. Porter, Clerk of the Appellate Court within and for the First District of Illinois hereby certify that the Transcript of Record hereto attached and marked "A" is the original transcript of record filed in said Appellate Court, on the fifth day of March A. D. 1906 by said appellant.

In testimony whereof I have hereunto set my hand and seal of said Court at Chicago this eleventh day of August A. D. 1908.

[SEAL.] ALFRED R. PORTER,
Clerk of the Appellate Court, First District, Illinois.

84 Record from Appellate Court, First District, to Supreme Court.

Nisi Prius, Gen. No. 211760.
Appellate Court, Gen. No. 12928.
Supreme Court, Gen. No. 6214.

RICHARD FERRIS
v.
CHARLES FROHMAN et al.

At a Term of the Appellate Court, Begun and Held at Chicago on Tuesday, the Second Day of October in the Year of Our Lord One Thousand Nine Hundred and Six Within and for the First District of the State of Illinois.

Present: Hon. Henry V. Freeman, Presiding Justice.
" " Frank Baker, Justice.
" " Frederick A. Smith, Justice.
Alfred R. Porter, Clerk. James Pease, Sheriff.

Court Opened by Proclamation.

No. 12928.

RICHARD FERRIS, Appellant,
vs.
CHARLES FROHMAN, CHARLES HADDON CHAMBERS, and STEPHANO GATTI, Appellees.

Appeal Cook Superior. Error to Cook.

85 Be it remembered, that on the sixth day of March A. D. 1906, it being one of the days of the March term A. D. 1906 certain proceedings were had in said Court and entered of record in words and figures following to-wit:

At a term of the Appellate Court, Begun and held at Chicago on Tuesday the sixth day of March in the year of our Lord One thousand nine hundred and six within and for the First District of the State of Illinois.

Present: Hon. Francis Adams, Presiding Justice.
" " Edward O. Brown, Justice.
" " Farlin Q. Ball, Justice.
Alfred R. Porter, Clerk. Thomas E. Barrett, Sheriff.

Court Opened by Proclamation.

And afterwards on the 7th day of March A. D. 1906 the following proceedings were had and entered of record in said cause to-wit:

In the Matter of the Assignment of Cases to the Branch Appellate Court.

On the Court's own motion it is ordered that the following numbered cases on the March term calendar A. D. 1906, of said court, be and they are hereby assigned to the Branch Appellate Court for hearing and determination to-wit:

108, 12928 et al.

And afterwards on the 22nd day of June A. D. 1906 the following proceedings were had and entered of record in said cause to-wit:

86 No. 12928.

RICHARD FERRIS, Appellant,
vs.
CHARLES FROHMAN et al., Appellees.

Error to Cook. Appeal from Cook Superior.

This cause having this day been reached in the call of the docket, and counsel desiring to argue the same and the Court not being fully advised in the premises, doth order that said cause be taken under advisement on briefs filed and appellant's reply briefs to be filed in twenty days and to be argued orally on a date in the future to be fixed by the Court.

And afterwards on the 29th day of June A. D. 1906, the following proceedings were had and entered of record in said cause to-wit:

12928.

RICHARD FERRIS, Appellant,
vs.
CHARLES FROHMAN ET AL., Appellees.

Appeal Cook Superior.

This day came appellees, by their counsel, and moved the Court for leave to amend the briefs heretofore filed herein on behalf of said appellees, as per stipulation filed herein; and the Court, being fully advised in the premises doth order that said motion be and the same is hereby allowed.

And afterwards on the 1st day of February A. D. 1907 it being one of the days of the October Term A. D. 1906 of this Court the opinion of the Court was filed in said cause in the words and figures following to-wit:

87 108, 12928.

RICHARD FERRIS, Appellant,
vs.
CHARLES FROHMAN, CHARLES HADDON CHAMBERS, and STEPHANO GATTI, Appellees.

Appeal from Superior Court of Cook County.

Statement by the Court.

Counsel for appellant make in their brief the following statement of the facts disclosed by the record, and counsel for appellee state it is substantially correct:

"The record shows that in 1894 Charles Haddon Chambers and B. C. Stephenson, citizens and residents of London, England, created and invented an original play called "The Fatal Card" which was publicly performed at the Adelphi Theatre in London on September 6, 1894, by A. & S. Gatti, who were theatrical managers. The play was registered at Stationers' Hall in compliance with the copyright statutes of the Kingdom, on October 31, 1894, and re-registered on November 8, 1894. This performance was with the consent of the authors of the play. In the same year Charles Frohman, one of the complainants, made an agreement with the authors for the right to produce the play in the United States. This agreement was dated June 13 1894 and was for a term of five years. This right expired, therefore, on June 13, 1899. On March 25, 1895, the complainant Frohman acquired all the interest of Stephenson in the play in and for the United States. His right to maintain the present bill, if he has any such right, rests upon this contract made with Stephenson over six months after the performance at the Adelphi Theatre
88 with the authors' consent and about six months after the copyrighting of the play in Great Britain. The play was never copyrighted in the United States. It is conceded for the purpose of this argument that George E. MacFarlane adapted this play of Chambers and Stephenson; called it by the identical name, "The Fatal Card" and that the defendant Richard Ferris caused this adaptation to be copyrighted in pursuance of the laws of the United States on the 16th day of August 1900, and thereafter caused the same to be produced and performed in various theatres of the United States, and was engaged in the business of so producing said play and causing it to be produced until enjoined therefrom in the present suit. The play was changed in many ways, but the substantial plot and *dramatis personæ* were sufficiently alike to justify the master's conclusions. It was an adaptation, but not a copy. It is

also conceded that this was done without the consent of the authors of the play."

Charles Frohman, at the time he made the contract (June 13 1894) for the American rights of this play, and at the time (March 25, 1895) when he purchased Stephenson's one-third interest in the play, was a citizen and resident of the United States.

Complainants filed this bill January 18, 1901, setting up the facts and praying for an accounting, for an injunction and general relief.

Appellant defendant answered, and a replication was filed by complainants.

The case was referred to a Master to take proofs and report the same with his conclusions. The Master reported that the complainants had failed to establish an exclusive right to produce
89 the play in the United States, and that the prayer of the bill should be denied, and the bill dismissed.

Objections and exceptions were duly filed. On the hearing before the Chancellor a decree was entered granting the relief prayed by the bill.

Mr. Justice SMITH delivered the opinion of the court:

There was some conflict in the evidence upon the question of identity of the two plays as copyrighted respectively by the parties to the controversy, or those in privity with them in England and in this country, but the concessions made by appellant, set forth in the statement preceding this opinion, leaves the case before us with no question of fact involved.

The bill is founded on the common law rights of the authors. The question, then, upon which the case hinges is: Did the public performance of the play by the authors in London, England, on September 6, 1894, and the registration thereof at Stationers' Hall in compliance with the copyright statutes of the United Kingdom, on October 31, 1894, and the re-registration thereof on November 8, 1894, have the legal effect of an abandonment or dedication to the public so as to extinguish the common law rights of the authors in the United States.

Property in an unpublished work is, without doubt, personal, and it is subject to the same general rules which govern personal property. As personal property is governed by the *lex domicilii*. Drone on Copyright, page 164; Scrutton on Copyright, page 127. "The property of an author in his intellectual production is abso-
90 lute until he voluntarily parts with all or some of his rights. There is no principle of law by which he can be compelled to publish it or to permit others to enjoy it. He has a right to exclude all persons from its enjoyment; and, when he chooses to do so, any use of the property without his consent is a violation of his right." Drone on Copyright, page 102.

It is competent, however, for the legislative authority to put limitations upon the duration and use of this character of property, and to provide the conditions under which an intellectual production may be published to the world without becoming public property, and when, if published, it is thereby dedicated to the public.

Under this authority Parliament, in 1833, passed an Act to amend the Laws relating to Dramatic Literary Property, 3 & 4 Will. IV. c. 15, which, after reciting that by an Act passed in the fifty-fourth year of his late Majesty George the Third, "the author of any book or books composed and not printed or published, or which should thereafter be composed and printed or published" should have a copyright for twenty-eight years, and that it is desirable to extend the provisions of the said Act, and provides that:

"From and after the passing of this act the author of any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment, composed and not printed and published by the author thereof or his assignee, or which hereafter shall be composed and not printed or published by the author thereof or his assignee, or the assignee of such author, shall have as his own property the sole liberty of representing or causing to be represented, at
91 any place or places of dramatic entertainment whatsoever, in any part of the United Kingdom of Great Britain and Ireland, in the Isle of Man, Jersey and Guernsey, or in any part of the British dominions, any such productions aforesaid, not printed and published by the author thereof or his assignee, and shall be deemed and taken to be the proprietor thereof. * * * for the period of twenty-eight years.

This act was again amended by the Act of 5 & 6 Vict. Ch. 45, Section 20, passed in July, 1842, as follows:

"Be it therefore enacted, that the provisions of the said act of his late Majesty, and of this act, shall apply to musical compositions; and that the sole liberty of representing or performing, or causing or permitting to be represented or performed, any dramatic piece or musical composition, shall endure and be the property of the author thereof, and his assigns, for the term of this act provided for the duration of copyright in books; and the provisions hereinbefore enacted in respect of the property of such copyright, and of registering the same, shall apply to the liberty of representing or performing any dramatic piece or musical composition, as if the same were herein expressly re-enacted and applied thereto, save and except that the first public representation or performance of any dramatic piece or musical composition shall be deemed equivalent, in the construction of this act, to the first publication of any book."

Prior to these enactments the public performance of a dramatic piece did not have the effect of publication unless the author's manuscript was printed or published. Under this Act of
92 1842, however, it is clear that the first public representation or performance of any dramatic piece is equivalent to the first publication of a book.

The record shows and the Master found that the play in question, called "The Fatal Card" was publicly performed at the Adelphi Theater in London, England, on September 6, 1894, with the consent of Charles Haddon Chambers and B. C. Stephenson, the authors; and the play was registered at Stationers' Hall in compliance with the copyright statutes of the United Kingdom of Great Britain on October 31, 1894, and re-registered on November 8, 1894.

After this first publication and registration of the play all the rights of the owners were derived from the statutes of 5 & 6 Vict. Sec. 20, and 3 & 4 Will. Iv., providing for copyright. MacGiliveray Law of Copyright, p. 36; Drone on Copyright, p. 576. The common law right ceased, and the statutory right attached on certain conditions named in the statute and formed the only protection to which the owners were entitled throughout the Kingdom of Great Britain. Boucicault v. Delafield, 1 Hem. & N. 597; Boucicault v. Chatterton, 5 Ch. Div. 267.

The solicitors for complainants appellees, however, contend that the publication of the play in England did not affect the common law rights of the authors in the play in America, and that those rights remained undisturbed thereby; and that notwithstanding the extinguishment of their common law rights in England they can assert them here. Counsel admit in argument that "when the publication of a play (meaning its dedication to the public) is by the act of the party the owners divests himself absolutely of all
93 exclusive rights in the play. Such a publication is a dedication the world over, because the party by his act so declares it." But they claim that the publication of this play in London was not such a publication; it was only a dedication by act of Statute law, and therefore an invasion of the owner's common law property rights to which his assent is not asked or needed.

To this contention we cannot assent. When the authors published the play at the Adelphi Theater, London, it was with their consent, as the record shows. That act was done and assented to under the law there in force, which expressly provided that it should be the legal equivalent "to the first publication of any book."

In Boucicault v. Chatterton, supra, the Court had under consideration the effect of a representation of a dramatic work in the United States before it was copyrighted in England upon the right to a copyright under the statutes above referred to and the Court was necessarily required to construe the statutes and determine their effect upon this character of property. The Court held that the public acting of the play in New York was a publication which deprived the author of exclusive right in England. This broad construction of the English statute adopted by the English Courts had not been given to the statutes at the time (1870) when Crowe v. Aiken, 2 Biss. 208 was decided. As the Master suggests in his report, the learned Chancelor did not have in mind when deciding Crowe v. Aiken the effect given to the English statute in the Chatterton case.

94 In the case of Palmer v. DeWitt, 47 N. Y. 532, also relied upon by counsel for appellees, the author made an assignment of an exclusive right in a play in the United States to the complainant on February 1, 1868. The play was subsequently represented in a theatre in London on February 15, 1868. It was held that after the transfer of the exclusive interest in the play in the United States a representation of the play in London would have no effect upon the rights of the assignee. That portion of the opinion of the Court which relates to the real issue before the Court,

affords no light upon the case before us, the question there having but a remote relation (if it can be said to have any) to the question here presented.

We do not find in the cases cited by counsel for appellee authority for holding that after the performance of the play "The Fatal Card" in London with the consent of the owners and the registration at Stationers' Hall, the owners retained their common law rights in the United States. We think the performance in London and the registration at Stationer's Hall operated to destroy the common law rights of literary property in the authors, and that thereafter the only protection to which the authors or owners were entitled was that given by the statutes of England. Drone on Copyright p. 577.

The statutes of England relating to copyright have no extra-territorial force or operation. No copyright rights in the United States were reserved by the authors. Such rights were lost by failing to procure a copyright simultaneously under the laws of the United States.

95 Boucicault v. Wood Fed. Cas. No. 1693.
The Mikado case, 25 Fed. Rep. 183;
Fraser v. Mack, 116 Fed. Rep. 285;
Am. & Eng. Ency. of Law (2nd ed.), 528.

It follows, we think, that the English authors of this play had no property rights in the United States which they could confer upon appellee Frohman on June 13, 1894, or at any time subsequent to the publication in London. We are therefore of the opinion that appellees, complainants below, failed to establish an exclusive right to produce the play in the United States, and that the prayer of complainants' bill should be denied.

The decree of the Superior court is accordingly reversed and the cause remanded for proceedings in accordance with the views herein expressed.

Reversed and remanded with directions.

And thereupon on the same day to-wit the 1st day of February A. D. 1907, the following proceedings were had and entered of record in said cause to-wit:

No. 12928.

RICHARD FERRIS, Appellant,
vs.
CHARLES FROHMAN, CHARLES HADDON CHAMBERS, and STEPHANO GATTI, Appellees.

Error to Cook. Appeal from Cook Superior.

On this day came again the said parties, and the Court having diligently examined and inspected, as well the record and proceedings aforesaid, as the matters and things therein assigned for Error,

and being now sufficiently advised of and concerning the
96 premises, are of the opinion that in the Record and proceedings aforesaid, and in the rendition of the decree aforesaid, there is manifest error; therefore it is considered by the Court that for that error, and others in the Record and proceedings aforesaid, the decree of the Superior Court of Cook County, in this behalf, rendered, be reversed, annulled, set aside, and wholly for nothing esteemed, and that this cause be remanded to the Superior Court of Cook County for further proceedings in accordance with the views expressed in the opinion of this court this day filed herein.

And it is further considered that the said appellant recover of and from the said appellees his costs by him in this behalf expended, to be taxed, and that he have execution therefor.

And afterwards on the 13th day of February A. D. 1907, the following proceedings were had and entered of record in said cause to-wit:

No. 12928.

RICHARD FERRIS, Appellant,
vs.
CHARLES FROHMAN, CHARLES HADDON CHAMBERS, and STEPHANO GATTI, Appellees.

Error to Cook. Appeal from Cook Superior.

This day came appellees by their counsel and moved the Court for an appeal from the order and judgment of this court in said cause to the Supreme Court of Illinois; and the Court being fully advised in the premises doth order that an appeal be allowed herein
to the said Supreme Court on condition that appellees do
97 within twenty days from this date, execute and file in said cause a good and sufficient appeal bond conditione- according to law, in the penal sum of Five thousand dollars with surety thereto, to be approved by the court. And afterwards on the 4th day of March A. D. 1907 the following proceedings were had and entered of record in said cause to-wit:

12928.

RICHARD FERRIS
vs.
CHARLES FROHMAN et al.

Appeal Cook Superior.

This day came Moran Mayer and Meyer and moved the Court that they be substituted as attorneys for the appellees in said cause in place of Hogan & Hogan withdrawn; and the Court being fully advised in the premises, doth order that said motion be and the same is hereby allowed.

And afterwards, on the same day, to-wit, the 4th day of March A. D. 1907, the following proceedings were had and entered of record in said cause to-wit:

12928.

RICHARD FERRIS
vs.
CHARLES FROHMAN et al.

Appeal Cook Superior.

This day came appellees, by their counsel, and moved the Court to extend the time to and including April 4th A. D. 1907, in which to file their appeal bond to the Supreme Court of Illinois in said cause; and the Court being fully advised in the premises, doth order that said time be and the same is hereby so extended.

And afterwards on the 6th day of August A. D. 1908 a certain Writ of Error from the Supreme Court of Illinois was filed in said cause, which said Writ is hereto attached.

98 STATE OF ILLINOIS, *ss:*

Supreme Court.

The People of the State of Illinois to the Clerk of the Appellate Court of First District, Greeting:

Because, in the Record and proceedings, as also in the rendition of the Judgment of a plea which was in the Appellate Court of First District before the Judge thereof, between Charles Frohman, Charles Haddon Chambers and Stephano Gatti and Richard Ferris it is said manifest error hath intervened, to the injury of the aforesaid Charles Frohman, Charles Haddon Chambers and Stephano Gatti as we are informed by their complaint, and we being willing that Error should be corrected, if any there be, in due form and manner, and that justice be done to the parties aforesaid, command you that if judgment thereof be given, you distinctly and openly, without delay, send to our Justices of the Supreme Court the Record and proceeding of the plaint aforesaid, with all things touching the same, under your seal, so that we may have the same before our Justices aforesaid at Springfield, on the first Tuesday of October next, that the Record and proceedings, being inspected, we may cause to be done therein to correct the Error, what of right ought to be done according to law.

Witness, The Hon. James H. Cartwright, Chief Justice of our Court, and the seal thereof, at Springfield, this 30th day of July in the year of our Lord one thousand nine hundred and eight.

[SEAL.] CHRISTOPHER MAMER,
Clerk of the Supreme Court.

(Endorsed:) No. 6214. Supreme Court of Illinois. Charles Frohman et al., Plaintiffs, vs. Richard Ferris, Defendant. Writ of Error. This Writ of Error is made a Supersedeas and as such is to be obeyed by all concerned. Filed Appellate Court Aug. 6, 1908. Alfred R. Porter, Clerk.

STATE OF ILLINOIS, *ss:*

Appellate Court, First Dist.

A transcript of the record and proceedings of the suit, whereof mention is within made, with all things concerning the same, I hereby certify to the Justices of said Supreme Court at the day and place within mentioned, as within I am commanded.

This eleventh day of August A. D. 1908.

ALFRED R. PORTER, *Clerk.*

99 I, Alfred R. Porter, Clerk of the Appellate Court in and for the First District of the State of Illinois do hereby certify that the foregoing is a true copy of the final order and judgment and all other proceedings of the said Appellate Court in the above entitled cause of record in my office.

In testimony whereof, I have set my hand and affixed the seal of the said Appellate Court, at Chicago this 11th day of August in the year of our Lord one thousand nine hundred and eight.

[SEAL.] ALFRED R. PORTER,

Clerk of the Appellate Court of the First District.

STATE OF ILLINOIS,
County of Cook, ss:

In the Supreme Court of Illinois, December Term, A. D. 1908.

No. 6214.

CHARLES FROHMAN, CHARLES HADDON CHAMBERS, and STEPHANO GATTI, Plaintiffs in Error, Complainants,

vs.

RICHARD FERRIS, Defendant in Error, Defendant.

Error to Appellate Court of Illinois, First District.

Heard in that Court on Appeal from the Superior Court of Cook County—Hon. Joseph E. Gary, Judge, Presiding.

Assignment of Errors.

Now comes Charles Frohman, Charles Haddon Chambers and Stephano Gatti, plaintiffs in error in the above entitled cause, by Mayer, Meyer & Austrain, their solicitors, and jointly and severally say that in the record and proceedings aforesaid in the Appellate

Court of Illinois for the First District, there is manifest error in this to-wit:

100 (1) That the said Appellate Court erred in not affirming the decree of the Superior Court of Cook County Illinois.

(2) That the said Appellate Court erred in reversing the judgment and decree of the said Superior Court and remanding the cause with directions.

(3) That there are other errors manifest upon the record.

By reason whereof the appellants jointly and severally pray that said decree of said Appellate Court may be reversed and the judgment and decree of said Superior Court be affirmed.

MAYER, MEYER & SUSTRAIN,
Solicitors for Plaintiffs in Error.

101 Be it Remembered, to-wit, on the Tenth day of December A. D. 1908, the following order was by said Court entered of record to-wit:

6214.

CHARLES FROHMAN et al., Plaintiffs in Error,
vs.
RICHARD FERRIS, Defendant in Error.

Error to First District.

Now on this day come the parties hereto and this being one of the days set apart for the call of the docket under the rules of this Court, and it appearing to the Court that plaintiff in error hath filed herein a duly certified transcript of the record and proceedings of the Court below, together with printed abstracts thereof, and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said defendant in error having entered motion to affirm said judgment and for costs and procedendo, and said motions being taken under advisement for final hearing, and the Clerk of this Court reporting that said cause is now ready to be taken, and said cause is here submitted for the consideration and judgment of the Court:

Therefore it is ordered by the Court that this cause be and the same is hereby taken under advisement.

102 At a Supreme Court, Begun and held at Springfield on Tuesday, the Second day of February, in the year of our Lord One Thousand Nine Hundred and Nine, within and for the State of Illinois.

Present: James H. Cartwright, Chief Justice; John P. Hand, Justice; William M. Farmer, Justice; Orrin N. Carter, Justice; Guy C. Scott, Justice; Alonzo K. Vickers, Justice; Frank K. Dunn, Justice; William H. Stead, Attorney General; Warren C. Murray, Bailiff.

Attest:

J. McCAN DAVIS, *Clerk.*

Be it Remembered, that afterwards, to-wit, on the 19th day of February, 1909, the opinion of the Court was filed in the words and figures following to-wit:

No. 6214.

CHARLES FROHMAN ET AL., Plaintiffs in Error,
v.
RICHARD FERRIS.

Error to First District.

Appeal From ——.

103 No. 6214.

Agenda No. 3.

December Term, 1908.

CHARLES FROHMAN ET AL., Plaintiffs in Error,
vs.
RICHARD FERRIS, Defendant in Error.

Error to Appellate Court, First District.

This is an appeal from a judgment of the Appellate Court reversing a decree of the circuit court in a proceeding begun in the circuit court by plaintiffs in error for an injunction and other relief against defendant in error. There is no controversy as to the facts. In 1894 Charles Haddon Chambers and B. C. Stephenson, dramatic authors and playwriters, citizens and residents of London, England, created and invented a dramatic composition entitled "The Fatal Card." Said composition was original with said Chambers and Stephenson possessed considerable literary merit and was of substantial value to the authors as a literary product. It was a melodrama in five acts, written in manuscript form and was never printed. It was with the consent of the authors publicly performed at the Adelphi theater, London, England, September 6, 1894, by A. & S. Gatti, theatrical managers, who had acquired an interest from the authors in the royalties to be derived from a performance of the play. Plaintiff in error Charles Frohman is a citizen of the United States, and on March 25, 1895 purchased all the right, title and interest of Stephenson in said melodrama, with the exclusive right to produce and perform it in the United States of America and Canada. The play was never copyrighted in the United
104 States. It was publicly produced under the supervision of Frohman in cities of the United States and Canada, and appears to have met with popular favor and to have been a success financially. Afterwards, George E. MacFarlane adapted the composition of Chambers and Stephenson, called it by the same name,

"The Fatal Card," and transferred it to defendant in error, who caused it to be copyrighted in the United States and thereafter produced and performed it in various cities of the United States until enjoined from so doing under the bill filed in this case. It is not denied that the masters conclusion that the MacFarlane play "is substantially identical with the play claimed by the complainants" was justified by the evidence. The bill alleged that at the time Ferris obtained from MacFarlane the pirated copy of "The Fatal Card" he had full knowledge of complain-ts' rights; that he deceived the public by inducing them to believe that the play produced was the play of said Charles Frohman and his associates; that he made large profits by the production of said play, to the injury of the complainants and the bill prayed for an accounting and that the further production of the play by defendant in error be enjoined. After answer and replication filed the case was referred to a master in chancery to take the testimony and report his conclusions of law and fact. The master reported that in his opinion complainants failed to establish an exclusive right to produce the play in the United States and that the prayer of their bill should be denied and the bill dismissed. Objections to this report filed by the complainants were overruled by the master, and the cause was heard by the chancellor on the report of the master
105 and exceptions filed thereto by complainants. A decree was entered disapproving the master's report and finding that complainants had the exclusive right in the United States to represent and perform, and to allow others to represent and perform said melodrama, "The Fatal Card," and to otherwise use and enjoy the same" and it was ordered that the temporary injunction theretofore issued be made perpetual and that the defendant Ferris, account to complainants for the profits and royalties received by him through the production of the play. From this decree the defendant prosecuted an appeal to the Appellate Court for the First District and that court reversed the decree of the superior court and remanded the case, with directions to dismiss the bill. Complainants in said bill have sued out a writ of error from this court to review the judgment of the Appellate court.

Mr. Justice FARMER delivered the opinion of the court:

Plaintiffs in error base their exclusive title and right to perform said play upon what they contend to be their rights under the common law. Defendant in error contends that the public performance of the play in England with the consent of its authors, without causing it to be copyrighted in this country, was, so far as this country is concerned, such an act of dedication to the public as to extinguish the common law rights of the authors or their assignees in the United States. At common law the author of a literary composition had an absolute property right in his production which he could not be deprived of so long as it remained unpublished nor could he be compelled to publish it. This right of property exists at

common law in all productions of literature, the drama,
106 music, art, etc., and the author may permit the use of his productions by one or more persons to the exclusion of all others and may give a copy of his manuscript to another person without parting with his property in it. (Drone on Copyright p. 101, et seq.) "So, also, without forfeiting his rights he may communicate his work to the general public, when such communication does not amount to a publication within the meaning of the statute * * * It may be transmitted by bequest, gift, sale, operation of law, or any mode by which personal property is transferred." Id. 104. Upon the publication of the production the author's common law rights ceased, and it became public property unless protected by statute. To protect the rights of authors in their productions after publication, statutes in various countries have been enacted. Prior to 1891, an alien could not, under the copyright statutes in the United States, obtain a copyright upon his production, and the publication by an author in a foreign country by printing his production was held to have the effect of destroying his common law rights in his production in this country, and it became public property here. In March 1891, congress passed an act which extended to citizens of foreign countries the privilege of copyright in this country when such foreign countries granted the same privilege to citizens of the United States, and the statute provided that the existence of the conditions that authorized citizens of foreign countries to avail themselves of the privileges of copyright in this country "shall be determined by the President of the United
107 States by proclamation made from time to time, as the purposes of this act may require." On July 1, 1891, the President of the United States by proclamation announced that the laws of Great Britain and the British possessions permitted citizens of the United States the benefit of copyright on substantially the same basis as citizens of those countries, and the act of congress therefore became effective, and its benefits available to citizens of Great Britain and the British Possessions. Section 4956 of our copyright statute provides that "no person shall be entitled to a copyright unless he shall, before publication, deliver at the office of the Librarian of Congress, or deposit in the mail, addressed to the Librarian of Congress, at Washington, District of Columbia, a printed copy of the title of the book or other article, * * * for which he desires a copyright, nor unless he shall also within ten days from the publication thereof, deliver at the office of the Librarian of Congress, or deposit it in the mail, addressed to the Librarian of Congress at Washington, District of Columbia, two copies of such copyright book or other article." Even after the taking effect of the Act of 1891, an English author could not, after publication of his production in England, secure a copyright in this country, but in order to avail himself of that privilege it became necessary that simultaneously with his publication and securing a copyright in England he also comply with the copyright statutes in this country. A publication of his production without such compliance with our statutes prevented him from afterwards securing the benefits of our copyright

statutes and rendered the publication public property in this country. There is no provision in our statute for securing to the
108 author of a drama the exclusive right to perform it except where the drama is printed in a book, but the common law rights apply in such cases and the author does not lose his rights in the production by public representation (Drone on Copyright p, 119) By the English statute 3 & 4 Will IV. Chap. 15, which was amendatory of an act passed in the thirty-fourth year of the reign of his late Majesty King George III, it was provided: "And whereas it is expedient to extend the provisions of the said Act: Be it therefore enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that from and after the passing of this Act, the author of any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment composed and not printed and published by the author thereof or his assignee, or which hereafter shall be composed and not printed or published by the author thereof or his assignee, or the assignee of such author, shall have as his own property the sole liberty of representing, or causing to be represented, at any place or places of dramatic entertainment whatsoever, in any part of the United Kingdom of Great Britain and Ireland, in the Isles of Man, Jersey and Guernsey, or in any part of the British dominions, any such production, as aforesaid, not printed and published by the author thereof or his assignee, and shall be deemed and taken to be the proprietor thereof; and that the author of any such production printed and published within ten years before the passing of this Act by the author thereof or his assignee, or which shall hereafter be so printed and published or the
109 assignee of such author shall from the time of passing this act, or from the time of such publication, respectively, until the end of twenty-eight years from the day of such first publication of the same and also if the author or authors, or the survivor of the authors, shall be living at the end of that period, during the residue of his natural life, have as his own property the sole liberty of representing, or causing to be represented, the same at any such place of dramatic entertainment as aforesaid, and shall be deemed and taken to be the proprietor thereof." This act was amended by the Act 5 & 6 Vict. chap. 45, passed in 1842, which was a comprehensive enactment covering the subject of copyright in England, one provision of which relating to dramatic pieces and musical compositions, reads as follows: "Be it therefore enacted, that the provisions of the said Act of his late Majesty, and of this Act, shall apply to musical compositions; and that the sole liberty of representing or performing, or causing or permitting to be represented or performed any dramatic piece or musical composition shall endure and be the property of the author thereof, and his assigns, for the terms of this act provided for the duration of copyright in books; and the provisions hereinbefore enacted in respect of the property of such copyright, and of registering the same, shall apply to the liberty of representing or performing any dramatic piece or musical composi-

tion as if the same were herein expressly re-enacted and applied thereto, save and except that the first public representation or performance of any dramatic piece or musical composition shall be deemed equivalent in the construction of this Act, to the first publication of any book." The effect of these statutes was to substitute after the first publication for the common law right of the author the statutory right to represent or perform his production for the period limited by the statute. The public performance of the play in England had the effect of divesting the authors of their common law rights and investing them with the right conferred by the statutes.

The Act of 5 & 6 Vict. above quoted, provides: "That the first public representation or performance of any dramatic piece or musical composition shall be deemed equivalent, in the construction of this act, to the first publication of any book." Before the adoption of said act the public performance of a dramatic piece was not equivalent to the publication of a book and as we have said, the common law rights of the author were unaffected thereby. When the statutory conditions were complied with, the rights conferred thereby attached and the common law rights ceased. Drone, in his work on Copyright says (p. 100) "Property in intellectual productions is recognized and protected in England and the United States both by the common law and by the statute, but as the law is now expounded, there are important differences between the statutory and the common-law right. The former exists only in works which have been published within the meaning of the statute; and the latter only in works which have not been so published. In the former case ownership is limited to a term of years; in the latter it is perpetual. The two rights do not co-exist in the same composition, when the statutory right begins the common-law right ends. Both may be defeated by publication." It is not disputed that a performance of "The Fatal Card" in England was by the statute referred to a publication, and that in that country the aut-or's common law rights thereupon ceased.

Defendant in error contends that when the authors of the drama surrendered their common law rights in England for the rights conferred by the statutes, they ceased to have any common law rights in the production in England or elsewhere. Plaintiffs in error contend that as under our laws the performance of the manuscript drama is not a publication of it and does not deprive the author of his common law rights and as our statute provides no means for copyrighting a drama unless it is printed and published in a book, our courts in deciding what is such a publication as to divest the author of his common law rights, are not to be governed by what the English statute declares shall constitute a publication thereof. It is not by virtue of any statute that it has been decided the publication of a book, either in this country or in England is a surrender by the author of his common law rights and a dedication to the public unless protected by copyright under the statute. The basis of such decisions is, that by causing the book to be printed without the protection of the copyright, the author is deemed to

have relinquished all rights, both common law and statutory, and to have dedicated his production to the public; and this applies to books published in foreign countries as well as in this country.

In the absence of the provision of the English act referred to, that the first public representation or performance of a
111 dramatic piece shall be deemed equivalent in the construction of that act, to the first publication of a book it could not be claimed that the performance of "The Fatal Card" in England was a publication, any more than would its performance in this country, while it remained unprinted, be deemed a publication. The object of copyright statutes is to protect authors rights to their own productions. There is no international copyright law or agreement between this country and England providing for the copyrighting of manuscript dramas, and we have seen "The Fatal Card" could not have been copyrighted in this country without printing. In Drone on Copyright the author says there are essential differences between the right to multiply and dispose of copies of an intellectual production and the right to represent a literary or musical composition, though both are often called copyright. On page 553 the author says: "A dramatic composition is capable of two distinct public uses; it may be printed as a book and represented as a drama. With respect to the former use, there is no distinction, in law, between a dramatic and any other literary composition. The exclusive right of multiplying copies is called copyright. But this does not embrace the right of representation. As these two rights are wholly distinct in nature, it is not only important, but necessary, that they should be distinguished in name. The property in a dramatic composition is often called dramatic copyright. But this expression is faulty and inaccurate. If it refers to the exclusive right of printing a drama, it would be equivalent to the name poetic copyright, prose copyright, or historical copyright, as applied to works in poetry, prose or history. If its use is
112 restricted to the right of representing a drama it is not accurate because this is not a right to multiply copies in the proper meaning of that expression and cannot, therefore, strictly be called copyright. If it is intended as a name for both rights together, it can serve only to increase the confusion which should be wholly removed. The sole liberty of publicly performing a dramatic composition might more properly be called dramatic right or acting right. The expression stageright, coined by Charles Reade, is not uncommon, but there are objections to this word with respect both to its formation and the purpose which it is required to serve. I have adopted playright as being, in my judgment, the best name for the purpose. It is a convenient, euphoneous word, and its formation is analogous to that of copyright. As the latter word literally means the right to copy a work or the right to the copy, so playright means the right to play a drama or the right to the play. And it may properly be used to mean not only the right of representing a play, but also the right of performing a musical composition. "It would seem, therefore, that there is a logical distinction to be observed in dealing with the effect upon the author's rights of the

public performance of an unprinted drama and the publication of a printed book. It is not contended that the English statute has any extra-territorial effect, but, as we have said, the contention is that as under the English statute a performance of the drama was made a publication of it so that the author's common law rights ceased and their statutory rights attached in that country, it necessarily follows that the authors and their assignees can claim
113 no common law right in this country. A case much in point upon the question here involved is Crowe v. Aiken, 2 Biss. 208. That was, like this, a bill to enjoin the defendant, the manager of a theater in Chicago, from producing a play owned by the complainant. The play was a drama entitled "Mary Warner." Its author, Tom Taylor, was a subject of the Queen of Great Britain. The play was written for the plaintiff's wife, who was an actress and intended to impersonate the principal character. It was not intended for publication but for representation on the stage. After completion of the play the author transferred to the complainant all his right thereto and in the manuscript thereof, together with the exclusive right of representation on the stage in the United States for five years from June 1, 1869. The play was first represented at the Haymarket Theater in London in June 1869 and afterward the complainant and his wife came to the United States and performed it in the City of New York. The bill alleged that the play had never been printed by the complainant nor the author, nor with their consent nor published otherwise with their consent than by representation on the stage; that the defendant did not produce it at his theater by means of the memory of those who had witnessed it on the stage, but by a copy wrongfully and surreptiously obtained from the manuscript or from a printed copy wrongfully and fraudulently printed. The case came before the court on a motion to dissolve the preliminary injunction, and on the hearing an affidavit of one De Witt was read, in which he stated he furnished defendant with the copy of the play used by
114 him; that he procured it from a person in London etc. and that he, affiant, was advised that by section 20 of 5 & 6 Vict. chap. 45 "The first representation or performance of any dramatic piece in England is deemed equivalent to the first publication of a book."

It will thus be seen that the facts in that case make the decision applicable to the case at bar. The opinion was by Judge Drummond and while almost the entire discussion therein is pertinent to the present case, we quote a part of it as follows: "Mr. Taylor, then was the proprietor of the drama Mary Warner when finished, and when transferred to the plaintiff the latter became the proprietor on the terms of the transfer. Has the right of property been lost? It is conceded that it would be lost by any general publication of the play by the propr-etor which could be regarded as a dedication to the public, but save this it is difficult to fix on any rule which shall meet the case. The giving of a copy, or of several copies, of a manuscript will not necessarily be a publication. The representation of a play on the stage was decided in England before the statutes of 5 and

6 Victoria, not to be a publication * * * There was some question whether the author of a play had at common law the sole right of representation; but so long as the play existed in manuscript and was unpublished and not in some way dedicated to the public the sole right of representation or performance would seem to follow from the exclusive right of property. But the 20th section of the statute of 5 and 6 Victoria, chap. 45, put an end to this question by declaring that the first public representation or performance
115 of any dramatic piece should be deemed equivalent, in the construction of the act, to the first publication of any book; and I understand it has been decided in England that the public performance, even in a foreign country of a play of which an English subject is the author, defeats his claim to a copyright under the British statutes. It is insisted that as by this statute representation was publication, the play Mary Warner by performance in England was published there, and all right of property in the play was consequently lost, as well there as in the United States. This necessarily leads to the conclusion—and that is substantially the position of defendant's counsel—that there is no right of property in this country in the play except that conferred by the statutes, and particularly that of Aug. 18, 1856. I do not understand that the authorities have gone that far, and it does not follow because his claim under the statutes is gone that everything is lost. He may still stand on his natural, inherent right as the author and creator of the play, and maintain that right until in some mode, in reason or by statute, it is dedicated to the public * * * Neither, perhaps, can there be any doubt that Congress can declare what sort of publications of a literary or dramatic work shall constitute a dedication to the public. It follows from what has been said that a definition of the word representation by a British statute is not operative as such in this country, and in all the cases which have arisen here recently upon the rights of authors to unpublished plays written by Englishmen, the objection that their rights in this country were destroyed in consequence of the clause already referred to in section 20 of
116 5 & 6 Victoria, chap. 45, seems not to have been taken either by counsel or the court." The court found that the copy of the play had been obtained in an unlawful way, overruled the motion to dissolve the injunction and continued it in force. Tompkins v. Halleck, 133 Mass. 32, was also a bill for an injunction to restrain the defendant from representing at his theater in Boston a drama called "The World." The opinion states that the drama was originally composed in England where, after being presented it was sold to one Colwell of New York. After being successfully produced in New York it was assigned to the complainant, with the exclusive right to represent it in the New England states. It was never copyrighted nor printed. While being represented at Wallack's theater, in New York, two men, Byron and Mora, attended at the theater, and Byron committed as much of the play as he could to memory and after each performance dictated it to Mora until the copy was completed. Byron then made an agreement with the defendant to produce the play at defendant's theater, known as the Alhambra. As produced

by the defendant it was called "The World" and was in all substantial particulars identical with complainant's drama of the same name. It is true as stated by defendant in error, the greater portion of the opinion of the court is devoted to a discussion of Keene v. Kimball, 16 Gray, 545, and the reasons given for overruling that case. Keene v. Kimball held "that the literary proprietor of an unprinted play cannot, after making or sanctioning its representation before an indiscriminate audience, maintain an objection to any such
117 literary or dramatic republication by others as they may be enabled, either directly or secondarily, to make from its being retained in the memory of any of the audience." The court did, however, refer to and comment upon the English statutes, including 5 and 6 Vict. and held that the complainant was entitled to the relief prayed and to damages sustained by reason of the unauthorized production by the defendant. In Palmer v. De Witt, 2 Sweeney, 530 (40 How. Prac. 293, affirmed 47 N. Y. 532 an English author of a drama sold to complainant, prior to Feb. 1, 1868, the exclusive right to perform and print it throughout the United States. The drama was performed the first time in the Prince of Wales theater, London, Feb. 15, 1868, with the consent of the author. The defendant without authority of complainant, printed the drama, and offered it for sale. The complainant sought to enjoin these acts of the defendant, and the defense was that the common law rights in the play were lost by the performance of it in London. The court held contrary to this contention and sustained the complainant's right to the injunction. Defendant in error contends that Crowe v. Aiken and Palmer v. De Witt, are not in point, for the reason that the author in each of those cases has assigned to the complainant his rights in America before the first public representation of the play in England. Neither of those decisions appears to be based on any such distinction and in the former it was distinctly stated that a definition of a representation by the British statutes is not operative as such in this country. It is also claimed by defendant in error that it
118 is not stated in Tompkins v. Halleck supra, whether the presentation in England was a public representation of the play. While the word "public" is not used in the opinion where it is stated that the play was presented in England, we think it very clearly appears from reading the opinion that the court could have meant nothing but a public representation and as the court was dealing with the effect of a representation of the play in England upon the rights of the author and his assignee in this country, we cannot but consider the decision in that case applicable to the present case. In Tompkins v. Halleck the court applied to the decision of the case the rule announced in the opinion, that "the representation of an unprinted work upon the stage is not a publication which will deprive the author or his assignee of his rights of property therein." When it is borne in mind that the court was applying this rule to the play of an English author which had been represented in England and therefore by force of the statute, published in that country, it cannot reasonably be said, we think, that the case is not in point. Moreover, in that case, the assignment of the author's rights was made after the

play had been represented in England and it can not be said that the English statutes were overlooked for 5 and 6 Vict. are referred to in the opinion of the court. In Boucicault v. Delafield, 1 H. & M. 597, and Boucicault v. Chatteron, 5 L. R. Ch. Div. 267, the English courts held that performance of a drama in the United States should be considered as a publication. These cases were decided subsequent to the passage of the Act 5 and 6 Vict. and subsequent to the passage of the Act 7 and 8 Vict. Ch. 12. Section 19 of the latter
119 act provided that the author of a dramatic piece which should be first published out of her Majesty's dominions should have no copyright therein nor any exclusive right to the public representation or performance thereof. In both the cases referred to Boucicault was the author of dramas that had been first performed in this country and sought to prevent their production in England by persons acting them without his consent or authority. He was denied the relief asked on the ground that the public representation of the dramas in this country was a publication of them and by the 19 section of 7 and 8 Vict. he was not entitled to the protection of the British statutes, and it was said that this was true whether the author of the play was a British subject or an alien. It would follow, therefore that if "The Fatal Card" had been first performed in this country the English courts would have treated it as a dedication to the public and to have had the effect of divesting the author of any rights whatever, under the laws of England, to its exclusive production. As the English decisions appear to be based upon provisions of the statute referred to and there is no such statute in this country we are of opinion they are not decisive of the question here involved, and this view is sustained, we think, by the cases first above cited. The view of the Appellate Court was, that in Crowe v. Siken, supra, the learned chancellor did not have in mind the construction of the English statute adopted by the courts in the decisions we have cited. Crowe v. Aiken was decided in 1870 and Boucicault vs. Chatterton was not decided until 1876 but Bouicault vs. Delafield was
119½ decided in 1863, and Judge Drummond said in Crowe v. Aiken. "I understand that it has been decided in England that the public performance, even in a foreign country, of the play of which an English subject is the author, defeats his claim to the copyright under the British statutes." From this expression it would seem clear that the author of the opinion was familiar with the doctrine announced in the Delafield case, so that the opinion in that respect could not have been based upon any misapprehension. To our minds it is squarely in point and its reasoning sound. Besides it is in harmony with sound principles of justice, and we are disposed to follow it rather than adopt the rule that we are bound by the decisions of the English courts made under theis statute. The judgment of the Appellate Court will therefore be reversed and the decree of the circuit court affirmed.

Judgment reversed.

120 At a Supreme Court, Begun and Held at Springfield on Tuesday, the Second Day of February, in the year of our Lord One Thousand Nine Hundred and Nine, within and for the State of Illinois.

Present: James H. Cartwright, Chief Justice; John P. Hand, Justice; William M. Farmer, Justice; Orrin N. Carter, Justice; Guy C. Scott, Justice; Alonzo K. Vickers, Justice; Frank K. Dunn, Justice; William H. Stead, Attorney General; Warren C. Murray, Bailiff.

Attest:
J. McCAN DAVIS, *Clerk*.

Be it remembered, to-wit, on the Nineteenth day of February, A. D. 1909, the same being one of the days of the term of Court aforesaid, the following proceedings were by said Court, had and entered of record, to-wit:

No. 6214.

CHARLES FROHMAN, CHARLES HADDON CHAMBERS, and STEPHANO GATTI, Plaintiffs in Error,
v.
RICHARD FERRIS, Defendant in Error.

Error to First District.

And now on this day, this cause having been argued by counsel, and the Court having diligently examined and inspected, as well the record and proceedings aforesaid, as the matter and things therein assigned for Error, and now being sufficiently advised of and concerning the premises are of opinion that in the record and proceedings aforesaid and in the rendition of the judgment aforesaid, there is Manifest Error:

Therefore, it is considered by this Court that for that Error, and also in the record and proceedings aforesaid, the judgment of the Appellate Court in this behalf rendered, be reversed, annulled, set aside, and wholly for nothing esteemed, and the decree of the Superior Court of Cook County be affirmed in all things and stand in full force and effect.

And it is further considered by the Court that the said Plaintiffs recover of and from the said Defendant in error costs by them in this behalf expended, and that they have execution therefor.

[Endorsed:] No. —. Supreme Court of Illinois. —— —— vs. —— ——. Order Reversing and Remanding. Filed —— —, 190– —— ——, Clerk.

121 *Authentication of Record.*

SUPREME COURT, *State of Illinois, ss:*

I, J. McCan Davis, Clerk of said Court, Do Hereby Certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of Charles Frohman et al., Plaintiffs in error, vs. Richard Ferris, Defendant in error, and also of the opinion of the court rendered therein as the same now appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Supreme Court, at Springfield this 22nd day of April, A. D. 1909.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

J. McCAN DAVIS,
Clerk Supreme Court.

122 Be it remembered, to-wit, that on the 4th day of April, A. D. 1909, there was duly filed by the appellant in the Office of the Clerk of the Supreme Court of Illinois, a petition for writ of error with assignments of error from the Supreme Court of the United States to the Supreme Court of Illinois addressed to the Hon. James H. Cartwright, Chief Justice of the Supreme Court of Illinois, with the endorsement by the Chief Justice upon the said petition allowing said writ of error, which documents are in words and figures as follows, to-wit:

123 Be it also remembered that on the 12th day of March A. D. 1909, an order was duly entered of record by the Hon. James H. Cartwright, Chief Justice of the Supreme Court of the State of Illinois, allowing said writ of error and approving bond for writ of error, in words and figures as follows to-wit:

124 UNITED STATES OF AMERICA,
State of Illinois:

No. 6214.

CHARLES FROHMAN, CHARLES HADDON CHAMBERS and STEPHANO GATTI, Plaintiffs in Error,
vs.
RICHARD FERRIS, Defendant in Error.

Petition for Writ of Error.

To the Honorable Chief Justice of the Supreme Court of Illinois:

The petition of Richard Ferris respectfully shows that on or about the 19th day of February, A. D. 1909, the Supreme Court of the State of Illinois rendered a final judgment against your petitioner in a certain cause wherein Charles Frohman, Charles Haddon Chambers and Stephano Gatti were plaintiffs in error and your petitioner

was defendant in error, whereby the judgment of the Branch Appellate Court of the First District of Illinois was reversed and the decree of the Superior Court of Cook County, State of Illinois, theretofore rendered in favor of the said plaintiffs in error, was affirmed, as will appear by reference to the record and proceedings in said cause; and that said Supreme Court is the highest court of said state in which a decision in said cause could be had.

And your petitioner claims the right to remove said judgment to the Supreme Court of the United States by writ of error, under Section 709 of the Revised Statutes of the United States be-
125 cause in said judgment of affirmance of the decree of the Superior Court of Cook County, Illinois, and reversal of the judgment of the Branch Appellate Court, First District of Illinois, and the proceedings had therein in this cause, certain errors were committed to the prejudice of your petitioner, all of which will more in detail appear from the assignment of errors which is filed with this petition, whereby it appears there was drawn in question the validity of a statute of or an authority exercised under the United States, to-wit, the validity of the copyright of the United States issued to your petitioner for a play known as "The Fatal Card," as against the alleged common-law rights in the United States of the alleged writers of said play, which had been performed and published for the purpose of procuring a copyright thereon in England under circumstances which the English courts and statutes declare to be a publication of said play; The Supreme Court of Illinois holding that, notwithstanding such copyrighting in England, the authors and proprietors of said play being then resident citizens of the Kingdom of Great Britain retain their common-law rights therein in the United States without copyright, even as against a citizen of the United States who has changed and adapted the play and procured a copyright thereon in the United States by due compliance with the laws thereof, though it was found by the court below to be substantially the same as the original play; and whereby it was decided that the said copyright set up as a defense to the bill asserting said common-law rights was invalid. All of which is claimed by your petitioner is contrary to the copyright laws of the United States and likewise contrary to the treaties between the United Kingdom of Great Britain and Ireland and the United States; and it appears that the judgment of the Supreme Court of Illinois is against the right, privilege or immunity claimed by your petitioner, all as appears by the record of the proceedings in said cause, to which a reference is respectfully prayed.

126 Wherefore, your petitioner prays that a writ of error may issue in this behalf returnable into the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States, and your petitioner will ever pray, etc.

RICHARD FERRIS, *Petitioner*,
By ALDRICH & McROBERTS,
L. E. CHIPMAN,
Attorneys for Petitioner.

127 UNITED STATES OF AMERICA,
State of Illinois:

No. 6214.

CHARLES FROHMAN, CHARLES HADDON CHAMBERS, and STEPHANO GATTI, Plaintiffs in Error,
vs.
RICHARD FERRIS, Defendant in Error.

Assignment of Errors on Petition for Writ of Error to the Supreme Court of the United States.

Now comes the defendant in error in the above entitled cause in connection with his petition for writ of error herein, and respectfully presents and files therewith the following assignment of errors which he avers occurred upon the trial of said cause, as to which matters and things he says that the final judgment of the Supreme Court of Illinois entered herein on the 19th day of February, A. D. 1909, is erroneous in this, to-wit:

1. The court erred in holding that it was competent for the authors of said play to copyright their said play under the laws of Great Britain, and at the same time retain their common-law rights therein in the United States.

2. The court erred in holding that, notwithstanding the publication of said play in Great Britain, the authors thereof and their assigns retained common law rights therein in the United States.

3. The court erred in holding that the authors of said play, being then citizens of the Kingdom of Great Britain and Ireland and resident therein, were authorized to copyright said play pursuant to the laws of the Kingdom of Great Britain and Ireland, and
128 thereafter, without copyrighting the same in the United States and by virtue of the alleged common law rights in said play, confer upon the said plaintiff in error, Charles Frohman, by contract, the exclusive right to the performance of said play in the United States, as against a copyrighted adaptation of said play procured by the defendant in error upon compliance in all respects with the Copyright laws of the United States.

4. That the action of the court in holding that, notwithstanding the copyrighting and publication of said play by the authors thereof, who were at the time of said copyrighting and publication, citizens of the Kingdom of Great Britain and Ireland and resident therein, they were entitled thereafter by contract to confer upon the plaintiffs in error common law rights in said play, which were superior to the copyright obtained by the defendant in error of an adaptation of said play, which copyright had been obtained subsequent to the publication of said play in the Kingdom of Great Britain and Ireland.

5. That the holding of the court that the authors of said play being then resident citizens of the Kingdom of Great Britain and Ireland, could after copyrighting and publication of said play confer common law rights upon the plaintiffs in error for the exclusive

production of said play in the United States, is contrary to the copyright laws of the United States and contrary to the treaties concerning International Copyright between the United States of America and the Kingdom of Great Britain and Ireland.

For which errors, the defendant in error asks that the judgment of the Supreme Court of the State of Illinois be in all respects reversed.

ALDRICH & McROBERTS,
L. E. CHIPMAN,
Attorneys for Defendant in Error.

129 Writ of Error allowed upon the execution of a bond by the Defendant in Error, in the sum of five hundred Dollars, said bond, when approved, to act as a supersedeas.

Dated, this 12th day of March, A. D. 1909.

JAMES H. CARTWRIGHT,
Chief Justice Supreme Court of Illinois.

130 [Endorsed:] No. 6214. Supreme Court of Illinois. Charles Frohman et al., Plaintiffs in Error, vs. Richard Ferris, Defendant in Error. Petition for Writ of Error. Filed Apr. 4, 1909. J. McCan Davis, Clerk of Supreme Court. The clerk will please file. Aldrich & McRoberts, 205 La Salle Street.

131 Be it remembered that on the 4th day of April A. D. 1909, there was duly filed in the office of the Clerk of the Supreme Court of Illinois by Charles Frohman et al. an original bond for writ of error from the Supreme Court of the United States to the Supreme Court of Illinois in words and figures as follows, to-wit:

132 Know all men by these presents, that we, Richard Ferris, as principal, and the United States Fidelity & Guaranty Company, as surety, are held and firmly bound unto Charles Frohman, Charles Haddon Chambers and Stephano Gatti in the full and just sum of five hundred dollars ($500.00) to be paid to the said Charles Frohman, Charles Haddon Chambers and Stephano Gatti, their certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals and dated this thirtieth day of March in the year of our Lord one thousand nine hundred and nine.

Whereas, lately at a session of the Supreme Court of the State of Illinois, in a suit pending in said Court, between Charles Frohman, Charles Haddon Chambers and Stephano Gatti, plaintiffs in error therein, and Richard Ferris, defendant in error therein, a judgment was rendered against the said defendant in error and the said defendant in error having prayed for and obtained a writ of error returnable into the Supreme Court of the United States to reverse the judgment in the aforesaid suit.

Now the condition of the above obligation is such, that if the said Richard Ferris, the said defendant in error shall prosecute his writ to effect, and shall answer all damages and costs that may

be awarded against him if he fail to make his plea good, then the above obligation to be void; to otherwise remain in full force and virtue.

RICHARD FERRIS, [SEAL.]
By CHARLES F. ALDRICH,
Att'y. [SEAL.]
THE UNITED STATES FIDELITY & GUARANTY CO.,
By THOMAS W. THOMPSON,
Att'y in Fact.

Sealed and delivered in presence of
C. G. McROBERTS.

Approved by
JAMES H. CARTWRIGHT,
Chief Justice Supreme Court of Illinois.

133 Be it remembered that on the 4th day of April A. D. 1909, there was filed in the Office of the Clerk of the Supreme Court of Illinois an original writ of error which is hereby attached and is in words and figures as follows, to-wit:

134 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable Judges of the Supreme Court of the State of Illinois, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, or some of you, being the highest court of law or equity of the State in which a decision could be had in the suit between Charles Frohman, Charles Haddon Chambers and Stephano Gatti, plaintiffs in error therein, versus Richard Ferris, defendant in error therein, wherein was drawn in question the validity of a treaty and statute of, and an authority exercised under, the United States, and the decision was against their validity; and wherein was drawn in question the construction of a clause of a treaty and statute of the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under said treaty and statute, manifest error hath happened to the great damage of the said defendant in error, the said Richard Ferris, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Wash-
135 ington, within thirty days from the date hereof, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right,

and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the thirty-first day of March, in the year of our Lord one thousand nine hundred and nine.

[Seal of Circuit Court U. S., Northern Dist. Illinois, 1855.]

H. S. STODDARD,
Clerk of the Circuit Court of the United States for the Northern District of Illinois.

Allowed by

JAMES H. CARTWRIGHT,
Chief Justice of the Supreme Court of the State of Illinois.

136 [Endorsed:] Supreme Court of the United States. Charles Frohman et al., plaintiffs in error, vs. Richard Ferris, defendant in error. Writ of error. Filed Apr. 4, 1909. J. McCann Davis, Clerk Supreme Court. Aldrich & McRoberts, 205 La Salle Street.

137 SUPREME COURT, STATE OF ILLINOIS, *ss:*

I, J. McCan Davis, Clerk of the said Court do hereby certify that there was lodged with me as such Clerk on the 4th day of April A. D. 1909, in the matter of Charles Frohman et al. vs. Richard Ferris.

1. The original bond of which a copy is herein set forth.
2. Two copies of the writ of error as herein set forth.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court, at my office, in Springfield, Ill. this 22nd day of April A. D. 1909.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

J. McCAN DAVIS,
Clerk Supreme Court of Illinois.

138 UNITED STATES OF AMERICA, *ss:*

To Charles Frohman, Charles Haddon Chambers and Stephano Gatti, Greeting:

You and each of you are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty (30) days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Supreme Court of the State of Illinois, wherein Richard Ferris is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable James H. Cartwright, Chief Justice of the

Supreme Court of the State of Illinois, this 31st day of March in the year of our Lord one thousand nine hundred and nine.

JAMES H. CARTWRIGHT,
Chief Justice of the Supreme Court of the State of Illinois.

Copy of the foregoing citation received this 6th day of April A. D. 1909.

LEVY MAYER,
Attorney for Defendants in Error.

139 [Endorsed:] Richard Ferris, Plaintiff in Error, vs. Charles Frohman et al., Defendants in Error. Citation. Filed Apr. 4, 1909. J. McCan Davis, Clerk of Supreme Court. The clerk will please file. Aldrich & McRoberts, 205 La Salle Street.

140 *Return to Writ.*

UNITED STATES OF AMERICA,
Supreme Court of Illinois, ss:

In obedience to the commands of the within writ I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of said Supreme Court of Illinois, in the City of Springfield, this 22nd day of April A. D. 1909.

[Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.]

J. McCAN DAVIS,
Clerk Supreme Court of Illinois.

Endorsed on cover: File No. 21,644. Illinois Supreme Court. Term No. 439. Richard Ferris, plaintiff in error, vs. Charles Frohman, Charles Haddon Chambers, and Stephano Gatti. Filed May 1st, 1909. File No. 21,644.

Office Supreme Court U. S.
FILED
OCT 27 1911
JAMES H. McKENNEY,
Clerk.

GEN. NO. 21644. TERM NO. 44.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1911.

RICHARD FERRIS,
Plaintiff in Error,

vs.

CHARLES FROHMAN, CHARLES HADDON CHAMBERS and STEPHANO GATTI,
Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

CHARLES H. ALDRICH,
CHARLES R. ALDRICH,
CHARLES G. MCROBERTS,
L. E. CHIPMAN,
Attorneys for Plaintiff in Error.

BARNARD & MILLER PRINT, CHICAGO

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1911.

Gen. No. 21644. Term No. 44.

RICHARD FERRIS,

Plaintiff in Error,

vs.

CHARLES FROHMAN, CHARLES HADDON CHAMBERS AND STEPHANO GATTI,

Defendants in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

STATEMENT OF FACTS.

In January, 1901, the defendant in error filed a bill against the plaintiff in error in the Superior Court of Cook County, Illinois, praying for an injunction restraining the three defendants from producing or performing a certain play entitled "The Fatal Card," and from in any manner interfering or meddling therewith.

This relief was sought upon the allegation that the play which Ferris was producing was a piracy of a play of which the complainant Frohman was the owner.

The bill alleged that in the year 1894 complainant Chambers, and one Stephenson, both of whom were dramatic authors and play-writers, collaborated and composed a certain melodrama in five acts, to which they gave the title "The Fatal Card," which melodrama was original with said Chambers and Stephenson, and was worth many thousands of dollars to them as a literary product. (Rec., 12.) The said melodrama was written in manuscript form, and was never printed, published or in any manner dedicated to the public use, except as hereinafter stated. (Rec., 12.) Thereafter the firm of A. and S. Gatti (of which firm complainant Stephano Gatti is the surviving partner), acquired from the authors a one-third interest in the royalties to be derived from the play. (Rec., 12.)

On June 13, 1894, complainant Frohman, a well-known producer of plays and a citizen of the United States, purchased from the authors the sole and exclusive American rights to the play for a period of five years. As this period expired in 1899, this license has no important bearing upon the present controversy. Thereafter, on March 25, 1895, complainant Frohman purchased all the right, title and interest of Stephenson in and to the said melodrama "The Fatal Card" with the exclusive right to produce, perform and represent said melodrama in the United States of America and Canada. (Rec., 13.) The granting of this exclusive license and the transfer of Stephenson's interest was assented to by Chambers and said firm of A. and S. Gatti. (Rec., 13.) At the time of the filing of the original bill herein (January 18, 1901) the complainants were

the sole and exclusive owners of said melodrama. (Rec., 13.)

The said melodrama was thereafter publicly produced in the principal cities of the United States and Canada under the personal supervision of Frohman, and its production was a success both artistically and financially. The receipts from said productions amounted to many thousands of dollars, and complainants laid out many thousands of dollars to properly stage the same. (Rec., 13.)

Thereafter one George E. McFarlane wrote a certain play to which he gave the name "The Fatal Card." This play he transferred to the defendant Ferris, who proceeded to advertise and perform it in various places of amusement in many of the large cities throughout certain states of the United States, and made large profits therefrom, to the financial injury and detriment of complainants. (Rec., 14.) This was done with full knowledge of complainants' rights in the premises, and without their consent. (Rec., 14.)

The defendant answered denying the principal allegations of the bill and setting up that for the drama which he was producing and against which the injunction was sought he held a copyright duly procured under the laws of the United States. (Rec., 7.)

He also averred that the complainants' drama had been publicly performed at the Adelphi Theater in London prior to the assignment or license to the complainant Frohman and also registered at Stationers Hall and that thereby the play had under

the Act of 5 and 6 Victoria, c. 45, become public property. (Rec., 21 and 22.)

The master to whom the cause was referred found that the play produced by the plaintiff in error was, with the exception of a few immaterial changes in dialogue and scene, and in the change of the names of characters and geographical location, the same as that of the complainants. (Rec., 36.) The detailed comparison as made by the master appears. (Rec., 32-36.)

The complainants below averred and the three defendants admitted that said defendant made an application for and obtained a copyright under the laws of the United States numbered 20539 for the play known as "The Fatal Card," as adapted and played by him and his licensees. This was in 1900. (Rec., 29-30.)

The authors, Chambers and Stephenson, it was found by the master, caused the play to be first publicly performed in England (where they were citizens and residents) on September 6, 1894. The play was registered on October 31, 1894, and re-registered on November 8, 1894. (Rec., 38.)

It appears and was found that Frohman's first contract for five years expired in June 13, 1899. prior to the filing of the bill herein, and that his rights, if any, depend upon his alleged purchase of the Stephenson interest on March 25, 1895, subsequent to the first public performance of the play. (Rec., 38.)

The owners of the English play had never copyrighted the same in the United States.

The master found that the play and playright is personal property, and as such governed by the *lex domicilii* of its owners; that as declared by 5 & 6 Vic., c. 45, sec. 20, the first presentation of the play was equivalent to the first publication of a book and therefore after the first presentation of "The Fatal Card" at the Adelphi Theater in London on September 6, 1894, all the rights of the owners were derived from that statute and that of 3 & 4 William IV providing for copyright (Rec., 39), and therefore all the common law rights ceased and all rights existing must be derived under the copyright acts. (Rec., 39.)

The master held that the authors and owners retained no common law rights in the United States and therefore could not maintain a bill against the defendants. (Rec., 40-41.)

On exceptions to the court the master's report was overruled in so far as he had held that the effect of the production of the play in London in 1894 was to deprive the complainants of common law rights in the United States. (Rec., 46.)

A decree was entered perpetually enjoining Ferris from reproducing his copyrighted play in the United States. (Rec., 24-27.)

This decree was reversed on February 1, 1907, by the decision of the Appellate Court of Illinois, First District. The opinion of the court is found Rec., 53, *et seq.*

This decision was reversed by the Supreme Court of Illinois December 10, 1908. The opinion of the court is found at page 61 *et seq.* of the record.

From this result the plaintiff in error has prosecuted his writ to this court.

BRIEF.

I.

The plaintiff in error by his answer in the trial court and in other proper ways claimed that the play which he was presenting and against which the injunction was sought, and which was finally enjoined as the result of the decision of the Supreme Court of the State of Illinois, was protected by a copyright duly procured under Section 4952 R. S. by the plaintiff in the United States.

He also claimed that the assertion of common law rights in a drama which had been copyrighted in England by its authors who were citizens of Great Britain was in conflict with the copyright arrangements between Great Britain and this country and the Act of March 3, 1891.

The final decision of the Supreme Court of Illinois was against these claimed rights and a federal question is therefore involved.

Erie R. R. Co. v. *Purdy,* 185 U. S. 148, 153.

C., B. & Q. Ry. Co. v. *Illinois,* 200 U. S. 561, 580, 581.

Murdock v. *Memphis,* 20 Wall. 635.

Pickering v. *Lomax,* 145 U. S. 310.

U. P. R. R. Co. v. *Colburn,* 164 U. S. 383.

Green Bay, etc., Canal Co. v. *Patten Paper Co.,* 172 U. S. 58, 68.

Dale Tile Company v. *Hyatt,* 125 U. S. 46.

Atherton v. *Fowler,* 91 U. S. 143.

II.

There could have been no decision in favor of the plaintiff below that did not in effect deny the right claimed under the copyright laws of the United States by the defendant below. In such case there is a federal question whether mentioned in the opinion of the court below or not.

Erie R. R. Co. v. *Purdy*, 185 U. S. 148, 153.

C., B. & Q. Ry. Co. v. *Illinois*, 200 U. S. 561, 580, 581.

Murray v. *Chatterton*, 96 U. S. 432, 441, 442.

III.

The statute 5 and 6 Vict., c. 45, Sec. 20, makes public performance of a dramatic work with the author's or owner's consent equivalent to the first publication of a book.

And in England it is held that performance in the United States with the owner's consent terminates the author's playright in England and makes the performing right *publici juris*.

Boucicault v. *Chatterton*, 5 L. R., Ch. Div. 267.

Boucicault v. *Delafield*, 1 H. & M. 597.

7 & 8 Vict., c. 12, Sec. 19.

Id. Drone on Copyright, 583.

Jefferys v. *Boosey*, 4 H. L. Cas. 815, 847, 852, 856.

Chappell v. *Purday*, 14 M. & W. 303.

Boosey v. *Purday*, 4 Ex. Rep. 145.

IV.

The performing right or playright had no existence at common law separate and apart from the manuscript of the author, but dates its origin from 3 & 4 Will. IV., c. 15, and in this country from the Act of Congress, August 18, 1856.

11 Stat. 138.

Boucicault v. *Chatterton*, L. R., 5 Ch. Div. 269, 273, 274, 279, 280.

Wall. v. *Taylor*, 9 L. R. Q. B. D. 727, 730.

Donaldsons v. *Becket*, 4 Burr. 2408.

Jefferys v. *Boosey*, 4 H. L. Cas. 815, 920, 922, 935, 936.

The English act was passed to give the right of performance and was brought about by the decision in *Murray* v. *Elliston*, 5 B. & Ald. 657.

Chappell v. *Boosey*, 21 Ch. Div. 232, 241.

V.

The public performance of a drama is in all respects analogous to the right to multiply copies of a book. It is not a common law right distinct from the manuscript.

Boucicault v. *Chatterton*, L. R., 5 Ch. Div. 269, 273, 274, 279, 280.

Wall v. *Taylor*, L. R. 11 Q. B. D. 727, 730.

Donaldsons v. *Becket*, 4 Burr. 2408.

Jefferys v. *Boosey*, 4 H. L. Cas. 815, 920, 922, 935, 936.

Wheaton v. *Peters*, 8 Pet. 590.

Banks v. *Manchester*, 129 U. S. 123, 151.

White Smith Music Co. v. *Apollo Co.*, 209 U. S. 1, 15.

VI.

These statutes and decisions make public performance of the play a "publication" equivalent to the publication of a book and the word should have the same meaning in the law of literary property in this country if that equality of right with respect to such property as between the citizens of the United States and those of the Kingdom of Great Britain intended by the International Copyright arrangement and the Acts passed to carry it into effect is not to be defeated.

VII.

There can be but one publication and it makes no difference where this is made if with the consent of the author or proprietor.

The Mikado Case, 25 Fed. 183.

Drone on Copyright, pp. 293, 295 and 577.

Boucicault v. *Wood*, Fed. Cases, No. 1683.

Pierce v. *Bushnell Mfg. Co.* v. *Werckmeister*, 72 Fed. 54.

7 Amer. & Eng. Enc. of Law, 2nd Ed., p. 528, Sub. Copyright.

25 Cyc., 1495, and cases cited.

VIII.

Counsel's contention is rendered presumptively unsound by the history of the struggle for international copyright arrangements.

2 Senate Documents, 24th Congress, 2nd Session, Doc. 179.

Various Messages of President, p. 7 this brief.

Report Royal Commissioners on Copyright, p. 8 this brief.

Sec. 4971 Rev. Stat. U. S.

Act March 3, 1891, 26 Stat. 1106-1110.

IX.

It was not the intention of Congress to give to foreign citizens and composers advantages in this country which, according to the international copyright convention, were to be denied to citizens of this country abroad.

White-Smith Music Co. v. *Appollo Co.*, 209 U. S. 1, 15.

X.

No copyright can be obtained in this country after a publication in this or any foreign country.

Rev. Stat. U. S., Sec. 4956.

XI.

Publication puts an end to common law rights and all rights of the author or proprietor, unless he at the same time takes steps to initiate and secure statutory rights.

Drone on Copyright, pp. 100-104.

Macgillivray on Copyright, 36-38.

Jewelers Mercantile Agency v. *Jewelers Publishing Co.*, 155 N. Y. 241.

Mifflin v. *White Co.*, 190 U. S. 260.

Mifflin v. *Dutton*, 190 U. S. 265.

XII.

The two rights do not co-exist in the same composition.

Drone on Copyright, pp. 100-104.

Bobbs-Merrill Co. v. *Straus*, 210 U. S. 339, 346, 347.

Fraser v. *Yack*, 116 Fed. 285.

Jewelers Mercantile Agency v. *Jewelers Publishing Co.*, 155 N. Y. 241.

Tompkins v. *Halleck*, 133 Mass. 32, 36.

The claim that this proposition should be limited by adding the words "in the same country," or equivalent words, as contended by counsel for defendant in error, is without foundation.

XIII.

Copyright in a book or drama is the exclusive right of the owner to multiply and dispose of copies; this is where the drama is treated as a book. Playright is the exclusive right of public performance of the dramatic or musical composition.

There is no reason why one should cease upon publication, or when devoted to unrestricted public use, and not the other. That should be deemed publication in each instance which is adapted to make public the particular subject, *e. g.*, a book by printing and exposure to sale, so all who are willing to buy at the price can do so; a drama by public performance at a theater to which the general public is admitted upon purchase of tickets; a painting or statue by unrestricted public exhibition or the sale or disposition of copies without conforming with the statutory law regarding copyright.

ARGUMENT.

The question involved in the case at bar is whether a citizen and resident of the Kingdom of Great Britain who has composed a dramatic piece or play, caused it to be publicly performed in London, and afterwards registered at Stationer's Hall, thus obtaining a copyright of the same under the laws of England, but has not taken any steps to copyright the same in the United States, is yet possessed of an exclusive common law property right in his play and the right of reproducing the same as a play, *i. e.*, playright, as against a citizen and resident of the United States who has adapted the English play by changing certain scenes and dialogues, changing the names of characters and geographical location, and then copyrighted the play so adapted and changed under the laws of the United States.

The plaintiff in error insists that this question must receive a negative answer, while the defendants in error claim it must be answered in the affirmative.

The court will note that the plaintiff in error in his answer filed in the state court averred that he had procured a copyright under the laws of the United States for the play as adapted and performed by him and his licensees on August 16, 1900 (Rec., 7), and in an amendment to his answer made by leave of court he pleaded the English copyright law, the fact that it is provided therein that:

> "No assignment of the copyright of any book consisting of or containing a dramatic piece or musical composition, shall be holden to convey to the assignees the right of representing or performing such dramatic piece or musical composition, unless an entry in the said registry book shall be made of such assignment wherein shall be expressed the intention of the parties that such right should pass by such assignment."

And it is in and by said Act further provided that

> "the provisions hereinbefore enacted in respect of the property of such copyright and of registering the same, shall apply to the liberty of representing or performing any dramatic piece or musical composition as if the same were herein expressly re-enacted and applied, save and except that the first public representation or performance of any dramatic piece or musical composition shall be deemed equivalent, in the construction of this Act to the first publication of any book."

It is well to note in passing that the master found that no written assignment of such interest had been produced (Rec., 31) and that the only paper giving the complainant Frohman any interest (the five-year license) had expired prior to the commencement of this suit. (Rec., 38.) The record of the registry was before the master and failed to show any assignment within this statute. The court did not disturb this finding, the exceptions (Rec., 44) did not refer thereto and the court limited its action upon the exceptions to the one point heretofore stated.

It is, therefore, clear from the record that Charles Frohman's claim to an exclusive right to reproduce

the play in the United States is based upon an oral "assignment" from one of the authors, Stephenson. The master finds that the other author, Chambers, "has never parted with his interest in the play so produced by himself and said Stephenson," * * * "and I am, therefore, of the opinion that the complainants Chambers and Frohman have an equal joint interest in the earnings of the play." (Rec., 31-32.) Stephenson is not a party.

The amended answer also averred the publication by public performance on September 6, 1904, and relied upon the principle that it had become public property in England and was not to be deemed private property in the United States under a purchase made after the play was public in the country where the owners were domiciled.

The defendant, therefore, in effect presented two defenses:

First, that by reason of the acts done by the original owners under the law of their domicile their common law rights had ceased to exist, and both by the laws of England and the United States and the treaty between these two countries all rights of the authors must be derived under the copyright laws, and as there had been no attempt to comply with the copyright laws of the United States, the authors possessed no property rights in the United States. and, therefore, could confer no such rights upon Mr. Frohman.

Second, that the adapted play had been copyrighted under the laws of the United States by the defendant, and, therefore, the defendant was author-

ized and empowered to produce and license others to produce such copyrighted play.

In the courts below it was urged upon the court that to entitle one to a copyright under the laws of the United States, the article copyrighted was not required to be wholly or largely original. The successive editions of copyrighted works shows that it is immaterial whether the new edition is produced by condensing, expanding, correcting, rewriting or otherwise altering the original; or by adding notes or citations; nor is it necessary that the new edition shall be an improvement on the old. So at least Drone on Copyright, pp. 147-149, states the law. He reports the case of *Black* v. *Murray*, 9 Scotch Sess. Cas., 3rd Ser., 341, where the question was mooted whether the change of one word in Sir Walter Scott's Glenallen's Earl would sustain a new copyright. He shows that compilations, annotations, dictionaries, itineraries, guide books, collections of statistics, etc., are all subject to copyright. The master found that the plays were substantially identical. He shows many changes in name and scene as well as language. We have admitted the substantial identity, but not the complete identity. The play is an adaptation. There is nothing in the averments of the bill or the finding of the master which shows or tends to show that the changes were not sufficient to justify copyright in this country.

> "A fair abridgment of any book is considered a new work, as to write it requires labor and exercise of judgment." *Story* v. *Holcombe*, 4 McLean, 306; vide. Also *Attwill* v. *Ferrett*, 2 Blatch. 39

Scrutton on Copyright, p. 143, thus states the law:

> "Copyright and playright can also be obtained in translation of a foreign play in which there is no copyright, but this does not hinder others from making their own translations from the common source."

In *Tinsley* v. *Lacy*, 1 H. & M. 747, it is said:

> "It is no infringement of copyright to represent a play dramatised from a novel written by another author."

When copyrighted the defendants had a right to perform and prevent others from performing the play *as copyrighted*, not the play written by Chambers & Stephenson. As to the latter they had a right to produce but could not prevent others from producing it, because it was free to all.

These two defenses were not independent defenses, as will be manifest when we consider that the court might have found that the complainants below had common law rights and yet were not entitled to enjoin the production of a play which was an adaptation of the original play because such adaptation was copyrighted under the laws of the United States.

There was no ground presented by complainant's bill or by the answer, upon which a final decree could be entered in favor of the complainant below without overruling the claim of right made by the defendant in his pleadings and insisted upon at every stage of the proceedings, growing out of his copyright under the laws and treaties of the United States. We understand this to be the test of the presence or absence of a federal question, and rely upon the authorities cited under I and II of our

brief. The fact that the courts below rested their respective decisions upon arguments having reference to the effect of the performance of the play at the Adelphi Theater under the English statutes, and the co-existence of statutory rights in one country and common law rights in the other, in the same play, does not affect the question because the decision in favor of the complainant and against the defendant below could only be reached by denying the right, privilege or immunity specially set up and claimed under the treaties (that by publication and registry the play had become public property in the United States) and statute (copyright) of the United States. (*Erie R. R. Co.* v. *Purdy*, 185 U. S. 148, 153; *C., B. & Q. Ry. Co.* v. *Illinois*, 200 U. S. 561, 580, 581, and other cases cited in brief.)

It is not claimed that the decision of the Supreme Court of Illinois ignores any express words of any treaty of the United States with Great Britain, or denies any right claimed by the defendant below through any such words.

It is, however, insisted that such decision does violence to the purpose and intent of the arrangement for international copyright and the Act of March 3, 1891. This court has held in effect that the purpose of Congress was to secure equality of benefits for our citizens with the citizens of the countries with which the convention might be made. As was well said in *White-Smith Music Co.* v. *Apollo Co.*, 209 U. S. 1, 15:

> "It could not have been the intention of Congress to give to foreign citizens and composers advantages in our country which according to

> that convention were to be denied to our citizens abroad."

That, however, is precisely what the Supreme Court of Illinois has held Congress did do, when it held that, notwithstanding the performance of the play in London and its registry, all with the owner's consent, they yet retained common law rights in the playright in the United States.

If a citizen of the United States is the author of a drama which he causes to be publicly performed or copyrighted in the United States, but takes no contemporaneous action in England to secure a copyright there, it cannot be seriously contended that he could enforce any common law rights in the English courts, either in the manuscript or the right of reproduction by public performance. This is clearly and expressly held in *Boucicault* v. *Chatterton*, 5 L. R. Ch. Div. 267, where the court had under consideration the effect of representation in the United States of a dramatic work before it was copyrighted in England. This made it necessary for the court to determine what these statutes mean and their effect upon the character of the property. MALINS, V. C., said (pp. 271-272):

> "Then comes the question, what is publishing a work abroad? If that had not been the subject of judicial decision, I should have considered it open to very great doubt as to what really does amount to publication. No one would have the slightest doubt that if it had been printed and published abroad this section deprives the author of any right in this country; but the question I have before me now is with regard to a dramatic piece which has not been printed and published, but only acted.

Ought that to be considered publication? That question originally did admit of considerable doubt. For myself, I should certainly have thought that when a man is the author of a dramatic piece, which he does not print and publish, and which he does not intend to print and publish, but which, as far as he can, he intends, to retain as his own property during the period for which the law secures it to him, and only allows it to be acted by his permission, then publicly representing the piece would be publication, and I think I should have come to that conclusion; but it is unnecessary for me to go further into the question, because the principal points in the case arose in a suit in which Mr. Boucicault was plaintiff, and which came on before Vice-Chancellor Wood in 1863, with regard to another dramatic piece better known than even this piece is, and which was called 'The Colleen Bawn.' Mr. Boucicault filed a bill against Mr. Delafield, the proprietor of a theater in the provinces to restrain his performing the 'Colleen Bawn.' It turned out that the 'Colleen Bawn,' like the present piece, had been performed in New York. Then the question came as to publishing it abroad. If he had published it abroad, it was clearly admitted he would have no exclusive right. Now, what had he done? He had not published it in the sense that he had printed and published it, but he had publicly performed it. Vice-Chancellor Wood decided that the public performance in New York was a publication, and that, having published it in that way, he was, under the 19th section of the 7 Vict. Ch. 12, absolutely deprived of the exclusive right in *this* country. Mr. Glasse contended that the vice-chancellor proceeded under this section on the ground of printing: but it is perfectly clear to my mind, on considering the whole case, that the vice-chancellor, never having referred to the printing, but to the representation, did decide it on the ground

that public acting of it in New York was a publication which deprived the author (Mr. Boucicault) of exclusive right in *this* country."

The plaintiff appealed to reverse this decision of the vice-chancellor. In the Court of Appeals, JAMES, L. J., said (pp. 275-276):

"The 19th section of the International Copyright Act has a limited purpose only, expressed in terms showing the meaning of the word 'published,' which must express something, that can be predicated of a book, of a dramatic piece, of a musical composition, of a print or article of sculpture, or any other work of art; that is to say, its being made public by those means which are appropriate to the particular thing. A book is published by being printed and issued to the public; a dramatic piece or musical composition is published by being publicly performed; a piece of sculpture or other work of art by being multiplied by casts or other copies. That, as it appears to me, is the natural meaning of the word 'published' in that section, and that is the meaning attributed to it by the vice-chancellor. Mr. Glasse's main argument is that the word 'published' has obtained with respect to dramatic representation a particular meaning affixed to it by previous decisions, and so affixed to it that we must hold a play not to have been published unless it has been printed. This requires us, in fact, to introduce into Sec. 19 additional words to some such effect as this, 'Provided, always, that with respect to any dramatic performance this section shall not apply unless it shall have been first printed and published out of Her Majesty's dominions.' I quite agree with the decision to which Mr. Glasse referred, but when we look at them they none of them really bear upon the meaning of the word 'published' as used in what Mr. Glasse has called this code of laws. The cases referred to are cases in which the word 'published' was

used in the sense to which Mr. Justice COMPTON referred in *Jefferys* v. *Boosey* (4 H. L. C. 815), *i. e.*, as meaning the being made *publici juris*, that is to say, being made the common property of everybody, so that the author has lost all exclusive right in this country. This is the effect of the cases from *Macklin* v. *Richardson* (Amb., 694), down to *D'Almaine* v. *Boosey* (1 Y. & C. Ex., 298), and they do not afford any interpretation of the word 'published' which would enable us or entitle us in any way to construe the words of Sec. 19 as having any other than the natural literal meaning which would be attached to them by an ordinary person understanding the English language and reading the section for the purpose of ascertaining what rights he would acquire under it. I am of opinion that the decision of the vice-chancellor is right."

BAGGALLAY, J. A., said (p. 278):

"Some authorities have been referred to by Mr. Glasse, such as *Macklin* v. *Richardson* (Amb. 694), and the subsequent case of *D'Almaine* v. *Boosey* (1 Y. C. Ex., 298), for the purpose of showing that the mere representation on the stage was not a publication. Both of those cases were decided, one long before, and the other just before the passing of the Act 3 and 4 Will., 4, Ch. 15; therefore, they can give us no insight into the precise sense in which the words may have been used in that statute. Then comes the intermediate statute, the 5 and 6 Vict., Ch. 45; the 20th section of that Act made me for some time feel doubts as to the proper way of dealing with this case. That 20th section follows upon a previous section which had conferred on the authors of books an extended term within which they were to have copyright, and that extended term was to date from the period of the first publication of the book. Section 20 provides that the author of a dramatic piece shall have protection for a corresponding pe-

riod. Inasmuch as it was necessary to introduce some definition for the purpose of explaining what was to be the commencement of the period this term is used. When it is said that the author of a dramatic piece shall have protection for the same term as that which the author of a book shall have, it becomes necessary to say what is to be deemed the first publication of a dramatic piece corresponding or equivalent to the first publication of a book. It was, therefore, provided that the first public representation or performance of a dramatic piece should be deemed equivalent 'in the construction of this Act,' to the first publication of any book. At first it struck me that the use of the words 'construction of this Act,' instead of the words 'for the purposes of this Act,' was in favor of the plaintiff, but further consideration has led me to think to the contrary. If the words, 'for the purposes of this Act' had been used it would have been implied that this meaning was to be attached to the words in that Act only, but the use of the words 'in the construction of this Act' shows that the Legislature was merely introducing a definition of what was to be considered the first publication of a dramatic piece, when it was necessary to ascertain the term during which the dramatic right was to continue. As it now appears to me, there is certainly no inference to be drawn that this meaning of the word 'publication' was to be adopted only in the construction of that Act; but, on the other hand, in my view that clause throws considerable light on the meaning of the Legislature in using the words 'first publication' by giving it a definition answering to what would ordinarily and usually be recognized as its meaning."

BRETT, J. A., said (p. 279-281):

"After the arguments we have heard, it cannot be said that the interpretation of this statute is easy, but it seems to be admitted—at all

events it cannot be denied—that if the word 'published' is read in its ordinary sense as meaning 'made public,' the case is directly within the 19th section of 7 Vict., Ch. 12. Therefore, the question must be whether the word 'published' in that section is to be construed according to its ordinary comprehensive meaning, or is to have a limitation placed upon it. The limitation which must be put upon it, according to the argument which has been addressed to us on behalf of the plaintiff, must be a somewhat extensive one—that with regard to English authors, or composers of any dramatic piece or musical composition the word 'published' is to be understood in the limited sense of published by printing.

Now, in order to come to a safe conclusion it it is always necessary to consider the subject-matter with which we are dealing. The subject-matter here is a dramatic composition. A dramatic composition differs from many compositions in this, that it can be made use of in two different ways. It may be made use of by printing it, and distributing it as a written composition or a book. It may also be used by having it acted on the stage of a theater. If the author be an Englishman no doubt he has certain rights given to him by the statute, 3 and 4 Will., 4 Ch., 15, but a foreign author has no rights at all under that statute. If, therefore, a foreign author's play was first acted abroad, he could not afterwards claim any protection in England. He would have acted it abroad, have made it *publici juris* in England, and, therefore, anybody in England might act it here. It is said that an English author, although he allows his compositions to be acted abroad, does not come under the same difficulty, because he is protected by the statute of 3 and 4 Will., 4, Ch., 15. That may be, and although I have some doubts whether the limitation of the meaning of the word 'published' which has been contended for ap-

plies even to that statute, I will assume that it does, and that an Englishman, although his piece was first acted abroad, could claim the protection given by the statute of 3 and 4 Will, 4, Ch., 15.

* * * * * * *

If so, the word 'published,' when applied to English authors, must have one meaning, and another when applied to foreign authors under precisely similar circumstances. That seems to me to be contrary to the common canon of the construction of statutes, for it requires us to introduce into the statute the proviso that in the case of English authors representation out of Her Majesty's dominions shall not be considered a publication. That would be to introduce words which we have no right to introduce, unless there be something in the nature of the case which makes it obvious that such must have been the object of the Legislature. It is endeavored to make out this to have been the object by saying that it is unjust to take away the right of an English author. I see nothing contrary to reason or justice in saying that if an English author chooses to go abroad and there represent, or allow to be represented, his composition for the first time, he shall be in the same position as a foreigner who has done the same thing. If that be so, the word 'published' must have its natural construction, whether it is applied to the compositions of Englishmen or foreigners. That ordinary meaning is 'made public,' and a dramatic composition is made public the moment it is represented or acted. If Englishmen have their plays first represented abroad, they are by this statute placed on the same footing as foreigners; if they have them first represented in England they do not come under this statute at all; but their rights will be governed by 3 and 4 Will., IV., Ch., 15, and 5 and 6 Vict., Ch., 45."

We have quoted at this great length to show that the questions have been thoroughly considered by the English courts, and that while the mere performance of the play did not prior to the statute of 3 and 4 Will. IV, Ch. 15, amount to publication or dedication to the public apart from printing, and perhaps not then until the acts 5 and 6 Vict., 45, certainly after the last named enactment *performance* made publication. The owner being an Englishman and the first performance being made in England, the rights thereafter were solely statutory, and as the English statutes have no extra-territorial effect there was no protection in the United States. In other words, the play was published and became *publici juris,* as stated in the opinion, *supra,* except as the English statute reserved a right in England for twenty-eight years.

This case shows also that the playwright did not exist as a separate right apart from the manuscript until the 3 and 4 Will, IV c. 15.

This conclusion as to the non-protection of the American author under like circumstances is shown also by the enactment of Sec. 19 of the Act of 7 and 8 Vict., c. 12:

> "And be it enacted, that neither the author of any book, nor the author or composer of any dramatic piece or musical composition, nor the inventor, designer or engraver of any print, nor the maker of any article of sculpture, or of such other work of art as aforesaid, which shall after the passing of this Act be first published out of Her Majesty's dominions, shall have any copyright therein respectively, or any exclusive right to the public representation or performance thereof, otherwise than such (if any) as he may become entitled to under this Act."

If the principle of international copyright and the acts of Congress to carry it into effect rest upon the reciprocal equality of the citizens of the several countries with respect to literary, dramatic and musical productions, then the decision in the case at bar should be reversed.

The discussion of this question of equality of rights has impinged upon the question of publication, which is the question upon which the Supreme Court of Illinois went astray.

In the court below the learned counsel for defendant in error said:

> "If the play has been *published,* the common law rights in the manuscript are lost, but what constitutes such a publication *must be determined by our own decisions* and not by reference to the English statutes. In considering in this country as to what constitutes the publication of a book, it would be entirely immaterial if the English statute does declare that public performance of a manuscript drama is for certain purposes a *publication in England.* Both questions must be decided by reference to the rule in this country." (The italics are those of the learned counsel.)

Counsel denies the proposition that statutory and common law rights cannot co-exist in the same production is applicable to the playright. He said in his brief in the court below with reference to this proposition:

> "This is true in respect to *printed books and dramas* so far as the United States and Great Britain are concerned, for the reason that a statutory copyright cannot be obtained in either country without *printing* and *publication,* and such printing and publication in one country is

equivalent to a publication in the other, the decisions upon the question as to what constitutes a *publication* of a *printed* book being the same in both countries. But again we point out that the situation is not the same with respect to performing rights in manuscript plays, because in this country the performance of a play is *not a publication*, while in England for certain purposes it is. There is no reason, therefore, why common law rights in this country cannot and do not co-exist with statutory rights in England."

He proceeds:

"They have made reference to Drone on Copyright, pp. 100-104, wherein the rule is laid down that common law rights and statutory rights cannot co-exist. A reading of the author's text clearly discloses that he means that such rights cannot co-exist *in the same country*, for the reason that statutory rights are obtained *only after publication* and this puts an end to common law rights. This distinction is recognized by Drone. Thus on p. 577 that author says:

"'When a dramatic composition is published *in print*, by authority, all common law rights in it are lost.'

"On page 576 the same author says that:

"'In *England*, the common law right to the exclusive representation of a *manuscript* play is lost by the public performance of the piece.'

"The exact and careful language of the text shows that the author clearly had in mind the true distinction."

Counsel distinguishes the case of *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339, where the text from Drone on Copyright, *supra*, is quoted by stating that "the court was dealing with the copyright in printed books."

The Supreme Court of Illinois adopted the views of the learned counsel. (Rec., 65.) The court says:

> "It is not disputed that a performance of 'The Fatal Card' in England was by the statute referred to a publication, and that in that country the author's common law rights thereupon ceased."

The court, however, held that the definition of the word representation by a British statute is not operative as such in the United States and that the termination of all common law rights and the substitution of statutory rights in England did not curtail the common law rights in the playright in the United States.

We wish to disavow any claim that the English statute has any extra territorial effect. It is our claim, which we argue later, that the English author and his manuscript were subject to English law and the rights of the former and the character of the latter were fixed thereby.

The performing right, meaning thereby the sole and exclusive right of representing or causing to be represented a dramatic piece or musical composition by performance in public had its first statutory recognition in the Dramatic Copyright Act of 1833 (3 and 4 Will., IV c. 15), which provided:

> "from and after the passing of this act the author of any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment, composed and not printed and published by the author thereof or his assignee, or which hereafter shall be composed and not printed or published by the author thereof or his assignee, or the assignee of such author, shall have as his own property the sole liberty of represent-

> ing or causing to be represented, at any place or places of dramatic entertainment whatsoever, in any part of the United Kingdom of Great Britain and Ireland, in the Isle of Man, Jersey and Guernsey, or in any part of the British dominions, any such productions aforesaid, not printed and published by the author thereof or his assignee, and shall be deemed and taken to be the proprietor thereof" * * *

for a period of twenty-eight years.

This was again amended by the Act of 5 and 6 Vict., Ch. 45, Sec. 20, as follows * * * (Drone on Copyright, p. 671):

> "Be it therefore enacted, that the provisions of the said act of his late Majesty, and of this act, shall apply to musical compositions; and that the sole liberty of representing or performing or causing or permitting to be represented or performed, any dramatic piece or musical composition, shall endure and be the property of the author thereof, and his assigns, for the term of this act provided for the duration of copyright in books; and the provisions hereinbefore enacted in respect of the property of such copyright, and of registering the same, shall apply to the liberty of representing or performing any dramatic piece or musical composition, as if the same were herein expressly re-enacted and applied thereto, *save and except that the first public representation or performance of any dramatic piece or musical composition shall be deemed equivalent, in the construction of this act, to the first publication of any book.*"

We have seen in the lengthy quotation from the opinions in *Boucicault* v. *Chatterton*, 5 L. R. Ch. Div. 267, that the court there held that a public representation of a dramatic work in the United States with the consent of its author, was a publication.

It will be noted that Malins, V. C., asserts that the purpose of Sec. 19 of 7 Vic., c. 12, quoted above, is to prevent any person enjoying any rights conferred by the old acts concurrently with those created by the International Copyright Act.

The play had been registered at Stationers' Hall as a book in 1876. The performance in America was in 1874. The court held that a further purpose of the Act of 7 Vict., c. 12, was "to secure for this country the benefit of the first publication of new works."

It is to be noted also that Glasse, Q. C., in his argument before the vice chancellor, and again upon appeal denied the existence of any common law right in this right of dramatic representation, and asserts that such rights were purely of statutory origin (5 L. R. Ch. Div. pp. 269, 273). Malins assumes the truth of this, p. 270; HIGGINS, Q. C., and TERRELL, also stated (p. 274):

> "There is not a single case under the Copyright Acts which defines 'publication' for the present purpose. *Macklin* v. *Richardson* (Amb. 694), and *D'Almaine* v. *Boosey* (1 Y. & C. Ex. 298) were before the Act 3 and 4 Will. IV. c. 15, and do not bear upon the case, for until that act there was no such thing as an exclusive right of acting a play."

The opinion pronounced by JAMES, L. J., effectually disposes of the argument that a publication requires printing and exposure to sale. He says it has a meaning calculated to express something applicable to all the things to which the act relates, that is being made public by those means which are appropriate to the particular thing. BAGALLAY, J. A., in his

opinion, inferentially dates the origin of the right of exclusive representation to the Act 3 and 4 Will. IV. c. 15.

BRETT, J. A., says (p. 279, 280):

> "I see nothing contrary to reason or justice in saying that if an English author chooses to go abroad and there represent, or allow to be represented, his composition for the first time, he shall be in the same position as a foreigner who has done the same thing. If that be so, the word 'published' must have its natural construction, whether it is applied to the compositions of Englishmen or foreigners. That ordinary meaning is 'made public,' and a dramatic composition is made public the moment it is represented or acted."

This case shows that the acts done with respect to the play in England were effectual to vest in the authors of the play, the play right of which in the United States Mr. Frohman claims to own, a copyright under the English laws, and the case settled beyond controversy the meaning of the words "published" and "publication" in the statutes referred to. The Supreme Court of Illinois concedes that as far as English law is concerned there was "publication." It is our claim, also, that it settled the character of the property situated in England, where its owners were domiciled, and of which country they were citizens.

The statement of counsel in *Boucicault* v. *Chatterton, supra,* as to the statutory origin of the right of exclusive performance of a dramatic piece or playright is abundantly supported by the authorities. In *Wall* v. *Taylor,* 9 L. R., Q. B. D. 727, 730, the court said:

> "Previous to 1833 the liberty of performing dramatic pieces was not the subject of property; but by 3 and 4 Will. IV., c. 15, after reciting that it was expedient to extend the provisions of 54 Geo. III., c. 156, relating to copyright in printed books, it was enacted that the author of any tragedy, comedy, play, opera, farce, or any other dramatic piece or entertainment, or his assignee, should have as his own property the sole liberty of representing or causing to be represented at any place of dramatic entertainment any such production not printed or published by the author or his assignee, and should be taken to be the proprietor thereof for the term therein mentioned."

It was held in *Murray* v. *Elliston*, 5 B. & Ald. 657, that prior to 1833 the publication of a dramatic piece in printed form deprived the author of his performing right, or common law right, if any, to restrain publication by performance. The Dramatic Copyright Act, 1833, was passed to remedy this, and secured to the author the performing right in a dramatic piece which had been printed and published.

Chappell v. *Boosey*, 21 Ch. Div. 232, 241.

The opinion in this case assumes that the two rights of the dramatic author did not exist prior to the statute of 3 and 4 Will. IV., c. 15, and asserts that statute was "the first to create an acting right and was intended to alter and amend the law which existed when *Murray* v. *Elisston* was decided."

It is unnecessary to enter upon any general discussion of the common law right of the author in literary property. Since the decision in the House of Lords in *Donaldsons* v. *Becket*, 4 Burr 2408, and of this court in *Wheaton* v. *Peters*, 8 Pet. 591, it

must be deemed settled that the common law right after publication was taken away by statute, and that authors had no rights in their published works except as granted by statute. There was at common law no exclusive right of multiplying copies.

This statement has no reference to the property right existing in unpublished works. That there is such a right need not be here questioned. We insist that the performance and registry in London was a publication because the statute so declares and the English courts so hold. It is likewise a publication because the copyright in England only commences with publication. This is held in *Jeffreys* v. *Boosey*, 4. H. L. Cas. 815, 847, 852, 856. In this case it was held:

> "Copyright commences by publication; if at that time the foreign author is not in this country, he is not a person whom the statute meant to protect.
>
> An Englishman, though resident abroad, will have copyright in a work of his own first published in this country.
>
> B., a foreign musical composer, resident at that time in his own country, assigned to R., another foreigner, also resident there, according to the law of their country, his right in a musical composition of which he was the author, and which was then unpublished. The assignee brought the composition to this country, and, before publication, assigned it, according to the forms required by the law of this country, to an Englishman. The first publication took place in this country.
>
> Held, reversing the judgment of the Court of Exchequer Chamber, that the foreign assignee had not, by the law of this country, any assignable copyright here in this musical composition."

All the judges agreed that a publication abroad before publication in England would make the work *publici juris.*

There was much authority adduced by the judges to the effect that a foreigner residing abroad could copyright his unpublished work in England, they claiming that all that the English act required was that the first publication should be had in England. It was also declared by several judges that the foreigner could assign his rights in an unpublished work to another who could copyright and acquire exclusive rights in England if the first publication was there.

The decision of the House of Lords denied the benefit of the copyright act to the foreign author or his assignee.

In his opinion in this case, Mr. Baron PARKE calls attention to the two senses in which the word "copyright" is used in the following words (pp. 920-922):

> "If he lends a copy to another, his right is not gone; if he sends it to another under an implied undertaking that he is not to part with it, or publish it, he has a right to enforce that undertaking. This sense of the word 'copyright' has nothing to do with the present question, though, in the course of the argument, it has been sometimes used in that sense, when it was convenient to do so, particularly when it was contended that a copyright existed at common law. The other sense of that word is, the exclusive right of multiplying copies; the right of preventing all others from copying, by printing or otherwise; a literary work which the author has published. This must be carefully distinguished from the other sense of the word, and is alone to be looked at in the discussion of this case, and it would tend to keep our ideas clear in determining this question, if, instead of copy-

right, it was called the exclusive right of printing a published work, that being the ordinary mode of multiplying copies.

Whether such an exclusive right belonged to any one at common law is a question on which the highest authorities have differed. If it were necessary to give an opinion on that question, I should say that the rational view of the subject is most clearly against the existence of this right; and I believe that the weight of authority, taking into consideration the opinions expressed since the decision of the great cases of *Millar* v. *Taylor* (4 Burr. 2303) and *Donaldsons* v. *Becket* (*id.* 2408, 2 Bro. P. C. 129) and of *Hinton* v. *Donaldson* (Dict. of Decisions, Tit. Literary Property, 8307), quoted by Mr. Quain, at your Lordships' bar, is likewise against it; and so is the opinion of foreign judges administering English law. The expressions used by Lord Kenyon in *Beckford* v. *Hood* (7 T. R. 620, 627) evidently show that such was his opinion, and (921) Lord Ellenborough, in *Cambridge University* v. *Bryer* (16 East 317) shows an inclination of opinion to that effect, to which may be added the authority of the majority of the American judges in *Wharton* v. *Peters* (8 Peter's Rep. Supr. Ct., U. S., 591), cited by my brother, Byles.

But whether such an exclusive right of multiplying copies in this kingdom exists or not at common law, in favour of a subject of this country, it is clear that it does not exist in favour of a foreign author living abroad. By the municipal law of his own country he may have such a right, but that law has no extra-territorial power, and does not give him a right here. And it seems to me extravagant to contend that by natural law, or, as Lord Mansfield says, *Millar* v. *Taylor* (4 Burr. 2398), by 'the principles of right and wrong, the fitness of things, convenience and policy, and therefore by the common law,' or by the comity of nations, the subject of

> one country, on the publication of his works in other countries, has an exclusive right to the multiplication of copies in those countries, and can oblige the courts in each country to protect him in the exercise of that right. This point has not been disputed in the argument at your Lordships' bar."

All the judges in their opinions in this case use the word "copyright" as meaning "the exclusive right of multiplying copies" in their discussion of the question of its existence at common law. Lord Chief Baron POLLOCK, pp. 935, 936. This learned judge reaches this conclusion (pp. 937-938):

> "Weighing all the arguments on both sides, and looking to the authorities up to the present time, the conclusion I have arrived at is, that copyright is altogether an artificial right, not naturally and necessarily arising out of the social rules that ought to prevail among mankind assembled in communities, but is a creature of the municipal law of each country, to be enjoyed for such time and under such regulations as the law of each state may direct, and has no existence by the common law of England. It would follow from this, that copyright in this country depends altogether on the statutes which have been passed on this subject; and the next question is, What is the true construction of the various statutes, viz.: the 8th Anne, c. 19, and the 5th Geo. III., c. 156, now merged in the 5th and 6th Vict., c. 45?
>
> The laws of foreign nations have no extra-territorial power, so as to give to Bellini a copyright in this country, on the ground that he possessed such a right at Milan; and the English statutes on copyright do not, according to their true construction, in my judgment, apply to a foreign author residing abroad, or to his assigns."

He therefore concluded that while Bellini had property interests in Milan assignable there, he had no property interests in England, and hence nothing passed by his purported assignment, notwithstanding the first publication had been made in England and an attempt made by the English assignee to acquire statutory rights there. Mansfield's doctrine of a natural common law right of the citizen of one country in his production in countries foreign to his domicile is distinctly repudiated.

The cases of *Chappell* v. *Purday*, 14 M. & W. 303, and *Boosey* v. *Purday*, 4 Ex. Rep. 145, sustain this view. These cases are fully reviewed in the principal case and therefore need not be discussed at length here. It is sufficient to note that in the former case, as in the case at bar, there had been copyright in France, which was declared to be publication, and it was held that there were no rights in England to pass by the assignment in question. The House of Lords adopted the views of the Exchequer Court in holding that no common law right existed after publication; that the copyright in Milan was publication and nothing passed by the assignment.

In England, then, the exclusive right of representation of a dramatic or musical composition, like the exclusive right of multiplying copies of a book, is a statutory right only, and not a common law right. It is dependent, therefore, upon the municipal law, hence it is a right limited to the British possessions, as such laws have no extra-territorial effect.

Likewise, we have seen that in England the courts do not allow the citizen of the United States or other foreign country who has first published abroad by

a public peformance of his play or the copyrighting of his book, to obtain any rights in that country, either by copyrighting or at common law. In fact, having done these acts abroad, he has no property interests in England with which even an English citizen can be invested by assignment or otherwise.

It is conceded by the Illinois Supreme Court that the authors in England, by reason of the acts done, had there no common law rights, only statutory rights. The acts done were publication so declared by the statute and so designed by the policy of all copyright laws, and consisted of the public performance at the Adelphi Theater and the registry at Stationers' Hall. The very purpose of copyright laws is to secure this publication so that the fruits of talent and genius may be enjoyed by the people subject to the limited monopoly given the authors by the statute and which can be realized by the authors only as the public patronizes the author's work by attending the place of entertainment or purchasing the multiplied copies of the book. As we have seen, the courts hold that statutory copyright cannot exist except by publication.

We have referred to the case of *Wheaton* v. *Peters*, 8 Pet. 591, which placed this court at that early day in line with the decision in *Donaldsons* v. *Becket*, 4 Burr 2408, and assume that in this court there is and can be no recognized common law right in copyright, using the terms as defined by Mr. Baron Parke in *Jefferys* v. *Boosey, supra,* the exclusive right of multiplying copies. We understand this to be the sense in which the term is used in *White-Smith Co.* v. *Apollo Co.*, 209 U. S. 1, 15, where the court says:

> "In the last analysis this case turns upon the construction of a statute, for it is perfectly well settled that the protection given to copyrights in this country is wholly statutory. *Wheaton* v. *Peters*, 8 Pet. 590; *Banks* v. *Manchester*, 128 U. S. 244, 253; *Thompson* v. *Hubbard*, 131 U. S. 123, 151; *American Tobacco Company* v. *Werckmeister*, 207 U. S. 284."

This case is also authority to the effect that a dramatic piece or musical composition is not a property right at common law, and has no existence at common law apart from the tangible thing which evidences its creation, and as Mr. Justice HOLMES says in his concurring opinion:

> "is a right which could not be recognized or endured for more than a limited time, and therefore, I may remark in passing, is one which hardly can be conceived except as a product of statute, as the authorities now agree."

This, we assume, is limited to the public use of the author's conception, as distinguished from his private ownership and restricted use of the manuscript, not amounting to publication.

We assume these cases to be a correct statement of the law and that, as declared in *Wheaton* v. *Peters*, there is no common law of the United States, what can be invoked in this court to defeat the grant of the United States to the defendant in error and contained in the copyright owned and pleaded by him in the case at bar.

If our own citizens have no common law right to exclusively reproduce a play published abroad by public performance or through there being copyrighted, from what source did an English subject,

who had there divested himself of common law rights, secure the power to invest an American citizen with such common law rights in this country valid against the grant of the United States?

The policy of the United States towards the productions of authors and composers of foreign countries has always been inimical to any such claim. Prior to the Act of March 3, 1891, the benefits of the copyright acts existing here since 1790 have been restricted to citizens of the United States or residents therein.

The present writ of error may be fitly denominated an experiment with the court. Through four or more generations the leading jurists and authors of the country have been engaged in efforts to bring about international copyright arrangements, by which literary, artistic and musical property could be protected in the several countries.

The necessity for international copyright arrangements has been predicated at all times upon the following propositions:

First. A publication made the literary production free, and all the world might appropriate and use the same.

Second. Compliance with copyright laws was necessary to preserve property rights and at the same time make publication.

Third. The copyright law had no extra-territorial effect and consequently the publication made the property free except in the country where copyright was taken.

Fourth. Copyright cannot co-exist with common law rights.

Hence arose the necessity of international copyright arrangements by which an author, composer or other proprietor could also secure copyright in other countries and thereby preserve his monopoly in jurisdictions other than the one of his domicile.

It has always been an accepted principle that in the absence of copyright law or convention between nations, piracy is permissible. Thus, in the report of the select committee in 1837 (2 Senate Documents, 24th Congress, 2d Session, Doc. No. 179) we find the following:

> "That authors and inventors have, according to the practice among civilized nations, a property in the respective productions of their genius, is incontestable; and that this property should be protected as effectually as any other property is, by law, follows as a legitimate consequence. Authors and inventors are among the greatest benefactors of mankind. They are often dependent exclusively upon their own mental labors for the means of subsistence; and are frequently, from the nature of their pursuits or the construction of their minds, incapable of applying that provident care to worldly affairs which other classes of society are in the habit of bestowing. These considerations give additional strength to their just title to the protection of the law.
>
> "It being established that literary property is entitled to legal protection, it results that this protection ought to be afforded wherever the property is situated. A British merchant brings or transmits to the United States a bale of merchandise, and the moment it comes within the jurisdiction of our laws they throw around it effectual security. *But, if the work of a British author is brought to the United States, it may be appropriated by any resident here and republished, without any compensation what-*

> *ever being made to the author.* We should be all shocked if the law tolerated the least invasion of the rights of property in the case of the merchandise, whilst those which justly belong to the works of authors are exposed to daily violation, without the possibility of their invoking the aid of the laws.
>
> "The committee think that this distinction in the condition of the two descriptions of property is not just; and that it ought to be remedied by some safe and cautious amendment of the law."

The committee making this report consisted of Clay, Webster, Buchanan, Preston and Ewing. These were great lawyers, and yet, if counsel's contention here presented is sound, this committee erroneously stated the law, as have numerous committees, likewise composed of the most eminent lawyers in this country, in nearly every decade since that time. The same mistake has likewise been made by the presidents who have urged Congress to remedy this great wrong.

Message, Millard Fillmore, February 18, 1853.

Message, Franklin Pierce, February 13, 1854.

Message, Chester A. Arthur, December 6, 1881.

Message, Chester A. Arthur, December 1, 1884.

Message, Grover Cleveland, December 8, 1885.

Message, Grover Cleveland, December 6, 1886.

Message, Benjamin Harrison, December 3, 1889.

Message, Benjamin Harrison, December 1, 1890.

If counsel's proposition is sound that, notwithstanding a copyright and publication in England, the author retained his common law rights of prop-

erty in the United States and other countries and was under no necessity to take out a copyright in these other countries, it is likewise true that some of the greatest lawyers in England, speaking both from the bench and as members of parliamentary committees, have been in error. Thus (Drone on Copyright, p. 95):

> "* * * The Royal Commissioners on Copyright, in their report submitted to parliament in June, 1878, recommended that, on the condition of first publication in Great Britain, 'the benefit of the copyright laws should extend to all British subjects and aliens alike.' After reviewing the steady refusal of the United States to grant protection to British authors, either by law or treaty, the commissioners take this enlightened and philosophic position:
>
> "It has been suggested to us that this country would be justified in taking steps of a retaliatory character, with a view of enforcing incidentally, that protection from the United States which we accord to them. This might be done by withdrawing from the Americans the privilege of copyright on first publication in this country. We have, however, come to the conclusion that, on the highest public grounds of policy and expediency, it is advisable that our law should be based on correct principles, irrespectively of the opinions or the policy of other nations. We admit the propriety of protecting copyright; and it appears to us that the principle of copyright, if admitted, is one of universal application. We therefore recommend that this country should pursue the policy of recognizing the author's rights, irrespective of nationality."

This enlightened policy led to results in this country. Prior to 1891 Section 4971 of the Revised Statutes, United States, read as follows:

> "Nothing in this chapter shall be construed to prohibit the printing, publishing, importation, or sale of any book, map, chart, dramatic or musical composition, print, cut, engraving, or photograph, written, composed or made by any person not a citizen of the United States nor resident therein."

This was repealed by the Act of March 3, 1891 (26 Stat. 1109). Section 13 of this Act (26 Stat. 1110) provided:

> "That this act shall only apply to a citizen or subject of a foreign state or nation when such foreign state or nation permits to citizens of the United States of America the benefit of copyright on substantially the same basis as its own citizens; or when such foreign state or nation is a party to an international agreement which provides for reciprocity in the granting of copyright, by the terms of which agreement the United States of America may, at its pleasure, become a party to such agreement. The existence of either of the conditions aforesaid shall be determined by the president of the United States by proclamation made from time to time as the purposes of this act may require."

By proclamation of July 1, 1891, President Harrison announced that "satisfactory official assurances have been given that in Belgium, France, Great Britain and the British possessions and Switzerland the law permits to citizens of the United States the benefit of copyright on substantially the same basis as to citizens of those countries," and that, therefore, "the first of the conditions specified in Section 13 of the Act of March 3, 1891, is now fulfilled in respect to citizens or subjects of Belgium, France, Great Britain and Switzerland." (27 Stat. 982.)

Thus there was established the first international recognition of the rights of authors in literary property and the first protection afforded the citizens of the several countries granting similar rights to the citizens of other countries.

These arrangements in favor of citizens of other countries are all predicated upon their compliance with the copyright act of the several countries, and as we have seen, prior to the Act of March 3, 1891 (26 Stat. 1109), an alien could not obtain a copyright in the United States, and piracy was encouraged. Section 4592 Rev. Stat. limited the right of copyright to citizens of the United States. This was also amended by the Act of March 3, 1891, *supra*, so as to extend its provisions to any author, inventor, designer, composer, etc.

It can require but little reflection to see that the long struggle thus briefly outlined would have been wholly unnecessary if at all times an author possessed the right to take out in one country a copyright on the production of his genius and cause a publication of the same, and at the same time preserve his monopoly in all other countries by the assertion of his common law rights.

The fact that such a right has not been before asserted, notwithstanding the subject has been under consideration and investigation by the best minds of the leading civilized nations of the earth for nearly three-quarters of a century, is persuasive, and at least suggests that this court should not readily lend its aid to counsel's experiment towards the announcement of new law.

When we turn to a consideration of the nature of the right asserted and the character of the property involved, this conclusion is made manifest.

The author's rights in a play, book, musical composition or other literary production constitute a peculiar property. While the intellectual creation is in the mind of the author and has not been reduced to material form it does not possess the attributes of property; and, again, if it has been published or given to the world with the author's consent it ceases to be property; it is the author's property only when it has been given material form and so long thereafter as he by his conduct shows that it is *his intention* to retain his ownership therein. It has been the policy of enlightened nations to encourage literature and art and to that end the legislatures by enactments, and the courts by decisions have had much to say as to what acts shall and shall not be held to amount to publication. To the same end copyright laws have been enacted and after long and weary struggles, as we have seen, international copyright rules and regulations exist as between some of the leading civilized nations of the earth. In the discussion of the questions involved in this record it is essential to keep in mind the peculiar character of the property concerning which the litigation arose.

It is obvious the property right in a literary production of any character is personal; that is, the property is personal property as distinguished from real or mixed property, and as such is subject to the same general rules of transfer and succession as other personal property. (Drone on Copyright, p.

104.) This author thus states the difference between the common law and statutory rights of the author or owner in a literary production (pp. 100-104):

"Property in intellectual productions is recognized and protected in England and the United States, both by the common law and by the statute. But, as the law is now expounded, there are important differences between the statutory and the common law right. *The former exists only in works which have been published within the meaning of the statute; and the latter, only in works which have not been so published. In the former case, ownership is limited to a term of years; in the latter, it is perpetual. The two rights do not co-exist in the same composition; when the statutory right begins, the common law right ends.* Both may be defeated by publication. Thus, when a work is published in print, the owner's common law rights are lost; and, unless the publication be in accordance with the requirements of the statute, the statutory right is not secured. The common law property in a literary composition is violated by any unauthorized public use of it, whether by printing and circulating copies, or by reading it in public. Statutory copyright may be infringed by the circulation of copies; but not by publicly reading copies.

Copyright is the exclusive right of the owner to multiply and to dispose of copies of an intellectual production. It is the sole right to the copy or to copy it. The word is used indifferently to signify the statutory and the common law right of the owner in a literary or musical composition or work of art. As there are essential differences between the two rights, one is sometimes called copyright after publication or statutory copyright; and the other, copyright before publication, or common law copyright. Copyright is also used synonymously with lit-

erary property. Thus, the exclusive right of the owner publicly to read a literary composition, to exhibit a work of art, or to represent a drama, is often called copyright. This is not strictly correct; and, especially in the case of dramatic compositions, there are reasons for distinguishing in name the right of multiplying copies from that of representation. This latter right may well be called playright, for reasons which are given elsewhere.

Two principles are settled in English and American jurisprudence: 1. At common law, the owner of an unpublished literary composition has an absolute property therein. 2. When the composition is published in print, the common law right is lost. It may be regarded as conceded that the same is true of all kinds of intellectual productions which have been made the subject of statutory copyright, including maps, charts, musical compositions, engravings, photographs, paintings, works of sculpture, etc. In short, all productions of literature, the drama, music, and art, are within the protection of the law. 'The property of an author or composer of any work,' said Lord Chancellor COTTENHAM, 'whether of literature, art or science, in such work unpublished and kept for his private use or pleasure, cannot be disputed, after the many decisions in which that proposition has been affirmed or assumed.'

The property of an author in his intellectual production is absolute until he voluntarily parts with all or some of his rights. There is no principle of law by which he can be compelled to publish it or to permit others to enjoy it. He has a right to exclude all persons from its enjoyment; and, when he chooses to do so, any use of the property without his consent is a violation of his rights. He may admit one or more persons to its use, to the exclusion of all others; and, in doing so, he may restrict the uses which shall be made of it. He may give a copy of his

manuscript to another person, without parting with his literary property in it. He may circulate copies among his friends, for their own personal enjoyment, without giving them or others the right to publish such copies.

So, also, without forfeiting his rights, he may communicate his work to the general public, when such communication does not amount to a publication within the meaning of the statute. Thus, in the United States, a manuscript lecture, sermon, or any literary composition may be delivered or read to the public by the author, or a dramatic or musical composition publicly performed, and no person, without the consent of the author, acquires the right to make a similar public use of it, or to print it. And the same is true in England of literary compositions which are not dramatic."

Many cases are cited to support the several statements of law, but need not be added here.

It thus appears that the common law and statutory rights do not co-exist, and when the statutory right begins the common law right ends.

The above text from Drone on Copyright, to the effect that the two rights, viz.: the copyright and common law rights "do not co-exist in the same composition; when the statutory right begins the common law right ends," etc., is quoted at length and adopted in the recent decision of the Supreme Court in *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339, 346, 347. The plaintiff in error seeks to show that while the two kinds of property right cannot "co-exist in the same composition," they may co-exist in the same person and in different places, which is a manifest absurdity, as the subject of ownership is property, and the object, or property owned, is the com-

position, and co-existence, if possible, must pertain to both.

The court further quotes Lord Mansfield in *Miller* v. *Turner*, 4 Burr 2396, as to the character of the property, "a property in motion, and has no corporeal, tangible substance."

It is also a necessary conclusion from the above statements with reference to the character of the property that such character is governed by the *lex domicilii*. This is a universal rule as to the character of such property, and also a rule generally applicable with respect to the succession or transmission of personal property.

In the above statement of the principle to which we have cited authority we have stated that the rule is universal that the *character* of the property is fixed by the domicile of the owner, while the laws regulating its transmission by voluntary act or succession through death are generally likewise so fixed. We have thus carefully noted this sometime exception, not because it has any application to the case under discussion, but for the purposes only of accurate statement; the growing political and economical value of personal property as distinguished from real property has worked and is working a change in the character of private international law upon the subject of transmission of personal property and from this has grown the doctrine of *lex loci rei sitae;* however interesting this subject might be made, its discussion is obviously not pertinent to any issue here involved, as the authors of this play were domiciled in London and the sale upon which the complainant Frohman relies for his title was

there made after the publication through performance and registry had effected its publication by Act of Parliament. There is, therefore, no conflict of law as between the owners' domicile and the actual *situs* of the property involved in the present suit. It is conceded that by statutory enactment any country can provide for the protection of literary property and declare the conditions upon which it can be acquired or held. (*American Tobacco Co.* v. *Werckmeister*, 207 U. S. 284, 293.)

If the owner in England has published his play by public performance and registry to vest in himself the rights secured under the statutes of that country and at the same time wishes to secure rights in the United States, it is obvious that he must comply with the copyright statutes of the United States. This, at least, was obvious to the signatories of the Berne Convention, as it was stipulated in the Declaration of Paris, 1896, that a dramatic piece should not be published by performance, but only by being issued in printed form. All the countries of the Union were signatories except Great Britain. The United States was not a party to the Berne Convention or the Declaration.

In the Act of 1891, in force at the time Mr. Frohman claims to have acquired his rights from the authors, it was provided that the title of the dramatic composition should be deposited "on or before the day of publication in this or any foreign country, and two copies of such dramatic composition should be deposited with the Librarian of Congress or deposited in the mail," etc., "not later than the day of the publication thereof in this or any foreign country." This evinces a clear intent on the part of Con-

gress not to confer any rights upon the dramatic author unless publication through registry and deposit was made at as early a date in this country as in any foreign country.

In the court below the counsel for defendant in error contended that a foreigner

> "had common law rights in his manuscript here as long as the same remained *unprinted* and could restrain any other person from pirating the same. But for the author to obtain a copyright in his own country, he was obliged to *print and publish* his book there. This publication under the American law destroyed his common law rights in his manuscript and resulted in making the manuscript public property here."

The Supreme Court of Illinois adopted this view and said:

> "There is no international copyright law or agreement between this country and England providing for the copyrighting of manuscript dramas, and we have seen 'The Fatal Card' could not have been copyrighted in this country without printing."

The counsel was in error in supposing that the author was obliged to print and publish his drama as a book in England in order to preserve there his exclusive right to performance. As we have seen, performance there before performance elsewhere and registry at Stationers' Hall did that. And while it may be conceded that to obtain a copyright of a drama in this country, printed copies (no particular kind of printing is prescribed) must be deposited as above stated, it is not true that any American statute declares, as counsel implies, that *printing and publishing* abroad is the only method of publication which will prevent copyright here. Congress, in using the

language quoted, requiring deposit not later than the *publication* thereof in this or any foreign country, must be understood to mean such acts as amount to publication in such foreign country. Nor was the court more accurate than counsel in stating that there is no international copyright law between this country and England providing for the copyrighting of manuscript dramas. (Rec., 66.) We assume the court means by this statement that there is no international agreement regulating the second use of the drama, the right of representation referred to in the sentences immediately following the words quoted. Section 4952, R. S., gives the author the right, "in the case of a dramatic composition, of publicly performing or representing it or causing it to be performed or represented by others," upon compliance with the act.

Section 13 of the Act of March 3, 1891, applies the act to foreign citizens of countries permitting similar rights to our citizens, and on July 1, 1891, the President announced that the laws of Great Britain, etc., permitted citizens of the United States the benefit of copyright on substantially the same basis as citizens of the United States. The claim that there is no international arrangement protecting the playright is unfounded. The fact that printed copies must be deposited in this country is unimportant, as each nation, whether a party to the Berne Convention and later Declaration or not, must necessarily have the right to prescribe the terms upon which copyright of whatever nature shall be obtainable within its jurisdiction.

The early copyright acts in this country, as in England, failed to provide protection for the dra-

matic author, except as his work could be classified as a book. In the Act of August 18, 1856 (11 Stat. 138), the right was first given "the proprietor of a dramatic composition suited for public representation" the sole right to represent the same, and as we have seen, a similar clause was in the Act of 1891. We submit that the language of this court in *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339, 346, is as applicable to this statutory right as to the rights under consideration in that case. The court said (p. 346):

> "Recent cases in this court have affirmed the proposition that copyright property under the federal law is wholly statutory, and depends upon the right created under the acts of Congress passed in pursuance of the authority conferred under Article I, Par. 8, of the Federal Constitution: 'To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.' *American Tobacco Co.* v. *Werckmeister*, 207 U. S. 284; *White-Smith Music Co.* v. *Apollo Co.*, 209 U. S. 1; following the previous cases of *Wheaton* v. *Peters*, 8 Pet. 500; *Bank* v. *Manchester*, 128 U. S. 244-253; *Thompson* v. *Hubbard*, 131 U. S. 123-151."

In using the word "copyright property" here the court is not using it in the narrow, restricted sense of the right to multiply copies of a book or other literary work, but in the broad, generic sense of the exclusive right to literary property, coupled with use by the public. The language includes playright as applied to a drama.

The history of the statutory inclusion of the dramatic playright and musical compositions in this country and in England is strikingly similar, and

no reason is perceived why the same judicial results should not proceed therefrom. The fact that any other construction would give to English subjects greater rights in this country than are accorded to citizens of the United States in England, and that the policy of our law excluded foreign subjects from any rights prior to the international copyright arrangement, has been sufficiently stated heretofore.

We think the cases in this country, with certain exceptions noted hereafter, sustain the views here urged upon the court.

In *Boucicault* v. *Wood,* Fed. Cas. No. 1693, the court, Judge DRUMMOND, held that publication abroad with the owner's consent amounted to an abandonment of the author's rights under our laws. The court said:

> "There is evidence tending to show that these two plays were published—that is, printed—and that this publication was made in England. I do not think that would make any difference as to the right of the plaintiff, unless that publication was with the consent of the plaintiff. * * *
>
> "The fact that the two unpublished plays, after having been entered here, were published in England, would make no difference, unless that publication was with the consent of the plaintiff. No one would have the right to import and use them. Such consent, however, would be an abandonment of his rights, under our laws, and place him simply in the position of an ordinary English dramatist, who had published his plays in his own country; but this consent must be affirmatively proved."

In the Mikado case, 25 Fed. Rep. 184, WALLACE, J., said:

> "A resort to statutory copyright in the United States was indispensable if the authors desired to make publication of their work in print in England, and yet retain the right to control its dramatic representation in this country. They were well advised that, until publication of their manuscript, their exclusive right to multiply copies of their work and control its production upon the stage would be intact, but that after publication this right would become public property unless saved by statutory protection. Common-law rights of authors run only to the time of the publication of the manuscripts with their consent. After that the right of multiplying copies and, in the case of a dramatic work, of representation on the stage, by the rule of the common law it is abandoned to the public. *It is immaterial whether the publication be made in one country or another.* Such rights of authors as are saved by statute are not recognized extra-territorially, They can only be enforced in the sovereignty of their origin."

The necessary conclusion from the decision in *Pierce & Bushnell Mnfg. Co.* v. *Werckmeister,* 72 Fed. Rep. 54, is to the same effect. In that case a painting was completed in 1891 and exhibited from January to March, 1892, at Berlin, and in the summer of that year at Munich. The artist Naujok assigned the right of publishing the picture to the complainant Werckmeister, who copyrighted the painting on May 16, 1892, under the Act of Congress. There was no notice of copyright inscribed on the original painting or any visible portion thereof, although the photographic copies of the painting made in Germany and sent to this country were marked "Copyright 1892 by Photographische Gesellschaft," this being the complainant Werckmeister's trade or

business name. The Court of Appeals for the First Circuit ordered the bill dismissed because there had been no compliance with the statute requiring that the copyright notice should appear on all copies of the painting. The court held that the exhibition in Berlin and Munich was a publication within Section 4956 of the Act of Congress which requires the delivery "on or before the publication in this or any foreign country" at the office of the librarian of Congress a printed copy of the title of the book, map, chart, dramatic or musical composition, etc., and two copies of such copyrighted book, map, chart, dramatic or musical composition. The court said (p. 56):

> "But, although a person coming within the class mentioned in Section 4952 is entitled to a copyright upon complying with the provisions of Section 4956, he cannot enforce any right against infringers except upon giving the notice required by Section 4962, as amended by the Act of June 18, 1874."

In the subsequent case of *Werckmeister* v. *American Lithograph Co.*, 134 Fed. Rep. 321, the Circuit Court of Appeals, Second Circuit, reversed the decision of the lower court based on the case last cited, but such reversal was not because the case cited was not correctly decided, but because the lower court had made an erroneous application of its principles. It was held that the restrictive rules of the London Royal Academy the publication was a limited one and not such an one as was contemplated by our statute, thereby distinguishing the exhibition in the Royal Academy from the unrestricted ones at Berlin and Munich involved in the earlier case. This

was a return to the old question of what is publication, and is in accord with the principles above stated. It has no bearing upon the case at bar, where a statute not applicable to paintings, but only to dramatic and musical compositions, has declared that public performance with the owners' consent shall be deemed publication.

In 7 Am. & Eng. Enc. of Law (2d Ed.), 528, title "Copyright," we find:

> "The publication of an intellectual production abroad constitutes such publication as will operate as dedication of the work to the public."

In *Fraser* v. *Yack*, 116 Fed. Rep. 285, the court had before it a contract between an American publisher and English author whose novel was published serially in an English magazine. The contract was prior to the date of international copyright between the United States and England, July 1, 1891, and there was therefore no statute by which a copyright could be secured in the United States by a foreign author.

Prior to the publication of the work in America the greater portion had been published serially in England. It was held that there could be no subsequent copyright of the portion so published serially in England and that such matter had become free in the United States. The court (JENKINS and GROSSCUP) used this language (p. 288):

> "At the most, therefore, copyright could only comprehend the last seven chapters of the work. Bearing in mind that, upon publication in England of the work or parts of the work, there could be no copyright in the United States under the international copyright law of the parts thus

published, and at the time of the contract there was no international copyright law, the meaning of the contract would seem to be clear. Mr. Barrie could only secure any sum for publication of the work in America *by granting the use of his manuscript in advance of its publication in England, for any American publisher could after such publication issue it here without liability to Mr. Barrie or to Mr. Lowell. It could be reproduced with impunity.*"

In *Jewelers Mercantile Agency* v. *Jewelers Publishing Co.*, 155 N. Y. 241, the court held:

> A statutory copyright operates to divest the author of his common law right of literary property; and he cannot have at the same time the benefit of the copyright statute and also retain his common-law right.
>
> Publication also operates to destroy the common-law right of literary property, whether a copyright be secured or not.
>
> If a book be put within the reach of the general public, so that all may have access to it, no matter what limitations be put upon the use of it by the individual subscriber or lessee, it is published, and what is known as the common-law copyright, or right of first publication, is gone.

In *Carte* v. *Duff*, 23 Blatchford 347:

> "The authors of an opera published the libretto and vocal score of it in England, but did not publish the orchestral score. They thereby dedicated to the public the entire opera except the instrumental parts. By retaining the orchestral score in manuscript they did not retain the exclusive right to represent the opera, as a dramatic composition."

It is true that these cases refer to printing the manuscript, and counsel insist that the only publication which will deprive the author of his playright

or private property in his manuscript is to print it in this country; that until this is done, the right to exclusive performance remains.

Our contention is that the policy of our law in copyright, as in patents, is to have the author's work free in this country as soon as it is free abroad, and that a foreign author cannot have limited rights under the statute there and perpetual rights here; therefore, anything that amounts to publication abroad must be deemed publication here. It is true that there have been decisions holding that the public performance of a dramatic composition is not regarded as such a publication as dedicates the literary property therein to the public. We insist that upon principle such decisions are not applicable to the present case, where it is conceded the authors were subjects of Great Britain, and not only caused their play to be publicly performed, but registered, and had concededly terminated all common law rights there and invested themselves with a statutory right only. Our contention is that statutory and common law rights do not co-exist in the same manuscript at the same time, and this proposition cannot be limited by the statement that it is true only in the same place. There never was any common law right in the so-called playright apart from the manuscript, and now such right is purely statutory. When, therefore, the English statute declared that the public performance should be equivalent to the publication of a book, the right of the foreign author, when brought to this country, must be judged as though the manuscript had been printed and the play publicly performed.

It is true that the language of some cases and of some text-books may point to a different conclusion. The facts, however, were not identical, or the question here discussed was not referred to, and it is submitted with confidence that in so far as they may be deemed to conflict with the views here presented, they were not well decided.

Thompson v. *Halleck,* 133 Mass. 33 (s. c., 43 Am. Rep. 480), is based upon the express assumption that the play was not copyrighted. It is specifically declared that if a copyright has been obtained, it is dedicated to the public, subject to the protection afforded by the laws of copyright.

In this case the court in discussing *Crowe* v. *Aiken,* upon which so much reliance is placed by the Illinois Supreme Court, declare it a case where "no copyright had been obtained."

Palmer v. *DeWitt,* 47 N. Y. 532, was a case where the author of a play was a British subject and assigned to an American citizen the play or stage rights therein before performance in London, which took place soon after. In this case it is conceded that until the passage in England of the Act 3 and 4, Will. IV, c. 15, "the author could not prevent any one from publicly performing on the stage any drama in which the author possessed the copyright. He could only prevent the publication of his work."

This case proceeded upon the assumption that "so far as is disclosed by the case the drama remained in manuscript until printed by the defendant, and there is no claim it has been published by the author or the plaintiff or with their assent except by public performance on the stage; and if it

has not by that act become *publici juris,* it still remains the private property of the author or his assignee, who alone have the exclusive right to it and may prevent performance."

There is here no discussion of the question of the registry, the effect of the statute declaring the public performance equivalent to the publication of a book, of the question whether, if the author procures a statutory copyright abroad, he nevertheless possesses perpetual common law playright in this country, or is required, having taken statutory rights there, to acquire statutory rights in this country.

The International Copyright arrangement was not then in force.

In *Crowe* v. *Aiken,* 2 Biss. 208, the play was the product of a British author and was performed at the Haymarket Theater in London in 1869. After it was completed the author duly transferred in writing to the plaintiff all his right in the play and in the manuscript thereof, together with the exclusive right to its representation on the stage in the United States for five years from June 1, 1869. This, apparently, was before the performance in London. In this case the effect of the English statute making the performance equivalent to the first publication of a book was urged as a defense and is discussed by the learned judge deciding the case. The court at the outset expresses the opinion that the judges who maintained the common law right in *Miller* v. *Taylor* and *Donaldsons* v. *Becket* "had the strength of the argument on their side in the great discussion

to which they gave rise," and declares that this had been generally admitted in this country.

The court says (p. 211):

> "There was some question whether the author of a play had, at common law, the sole right of representation; but so long as the play existed in manuscript, and was unpublished, and not in some way dedicated to the public, the sole right of representation or performance would seem to follow from the exclusive right of property. But the 20th section of the statute of 5 and 6 Victoria, Chap. 45, put an end to this question by declaring that the first public representation or performance of any dramatic piece should be deemed equivalent, in the construction of the act, to the first publication of any book; and I understand it has been decided in England that the public performance, even in a foreign country, of a play of which an English subject is the author, defeats his claim to a copyright under the British statutes. * * * There can be no doubt of the authority of Congress to legislate on the subject of literary property, and to prescribe the terms upon which copyrights shall be granted, and when it has so legislated it may be truly said to create those rights under the law; and this is the sense of the language of the Supreme Court in the case of *Wheaton* v. *Peters*, 8 Peters 661, that Congress, instead of sanctioning an existing right, created it, because the court admits the right at common law. Neither, perhaps, can there be any doubt that Congress can declare what sort of publications of a literary or dramatic work shall constitute a dedication to the public.
>
> It follows from what has been said that a definition of the word representation by a British statute is not operative as such in this country, and in all the cases which have arisen here recently upon the rights of authors to unpublished plays written by Englishmen, the objec-

> tion that their rights in this country were destroyed in consequence of the clause already referred to in Section 20 of 5 and 6 Victoria, Chap. 45, seems not to have been taken either by counsel or the court."

There is throughout this opinion an assumption that statutory copyright had not been obtained. The effect of International Copyright acts and their purpose was not before the court.

We believe the decision erroneous if public performance apart from registry under the proper construction of the English act there divests common law rights and invests the owner with statutory rights.

We submit that a careful, painstaking review of the decisions and the reasons underlying them will compel the conclusion that the right of exclusive representation of a dramatic work does not exist and never has existed at common law apart from the unpublished manuscript of the play; that its independent protection had its origin in England in the Act 3 and 4 Will. IV. c. 15, and in this country in the Act of August 18, 1856; that it depends upon compliance with such statutes and that compliance in either country divests and was intended to divest the author of all common law rights both in publishing the drama as a book and of exclusive stage representation, and to invest him with exclusive statutory rights in both respects for the period prescribed by the act under which he proceeds; that, having invested himself with statutory rights in one country, it becomes *publici juris,* unless within the times limited and in the manner prescribed by the

laws of this country he complies with the terms of our Copyright Act, and that the character put upon his property by copyrighting it at his place of domicile can only be preserved under the International Copyright Act by acquiring similar rights in the countries permitting him so to do. It is only by such construction that it can be claimed that the necessity existed for international copyright action, or that reciprocal equality of right between the citizens of the several countries which have sought to declare such equality, can be preserved.

As said by this court in *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339, 346:

> "The copyright statutes ought to be reasonably construed with a view to effecting the purposes intended by Congress. They ought not to be unduly extended by judicial construction to include privileges not intended to be conferred, nor so narrowly construed as to deprive those entitled to their benefit of the rights Congress intended to grant."

And:

> "Recent cases in this court have affirmed the proposition that copyright property under the Federal law is wholly statutory, and depends upon the right created under the acts of Congress passed in pursuance of the authority conferred under Article I, par. 8 of the Federal Constitution: 'To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries.' *American Tobacco Co.* v. *Werckmeister*, 207 U. S. 284; *White-Smith Music Co.* v. *Apollo Co.*, 209 U. S. ——; following the previous cases of *Wheaton* v. *Peters*, 8 Pet. 590; Bank of Manchester, 128 U. S. 244-253; *Thompson* v. *Hubbard*, 131 U. S. 123-151."

This announcement of the proper rule of interpretation of the copyright statute is forcibly illustrated in *American Tobacco Company* v. *Werckmeister,* 207 U. S. 284, where the court held that:

> "The purpose of the copyright statute is not so much to protect the physical thing created as to protect the right of publication and reproduction, and the statute should be construed in view of the character of the property intended to be protected.
>
> In the case of a painting, map, drawing, etc., the copyright notice required by par. 4962 Rev. Stat. need not be inscribed upon the original article itself; the statute is complied with if the notice is inscribed upon the published copies thereof which it is desired to protect.
>
> In the United States property in copyright is the creation of Federal statute passed in the exercise of the power vested in Congress by Article I, par. 8 of the Federal Constitution, to promote the progress of science and the useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries, and the statute should be given fair and reasonable construction to effect such purpose.
>
> The Federal copyright statute recognizes the separate ownership of the right of copying from that which inheres in the physical control of the thing itself and gives to the assigns of the original owner of the right to copyright the right to take out copyright independently of the ownership of the article itself.
>
> The property of an author or painter in his intellectual creation is absolute until he voluntarily parts therewith. While the public exhibition of a painting or statue where all can see and copy it might amount to a publication, where the exhibition is made subject to reservation of copyright and to restrictions rigidly enforced against copying, it does not amount to a publication."

We contend that under these rules it would be utterly inconsistent to hold that those acts which under the laws and decisions of a foreign country constituted publication and amounted to a surrender of common law rights should not be held a publication in this country to vest in the author perpetual common law rights here. This is to defeat the purpose of the International Copyright arrangement. This case also inferentially, if not directly, holds that the exclusive right of multiplying copies of a painting as the right of reproducing a play apart from the original painting, in the one case, and the manuscript drama in the other, has its origin in the statute and must find its protection therein. The case is also an authority that printing is not the only way that a publication can take place. It is as reasonable to hold that the term "published" is a survival from former statutes and not to be strictly and technically limited to printing as applied to the reproduction of a drama as to pictures, statues, etc. This case seems to dispose of the argument of the Illinois Supreme Court that the only publication which would make the play *publici juris* is the printing and sale of the drama.

The court's language (p. 300) supports this view:

> "We do not mean to say that the public exhibition of a painting or statue, where all might see and freely copy it, might not amount to publication within the statute, regardless of the artist's purpose or notice of reservation of rights which he takes no measure to protect. But such is not the present case, where the greatest care was taken to prevent copying."

If this is true of the unrestricted exhibition of a painting, why is it not true of the public performance of a play?

In *Bong* v. *Campbell Art Co.*, 214 U. S. 236, 246, it was said:

> "In other words, an assignee within the meaning of the statute is one who receives a transfer, not necessarily of the painting, but of the right to multiply copies of it. And such right does not depend alone upon the statute as contended by plaintiff, but is a right derived from the painter and secured by the statute to the assignee of the painter's right. Of this the opinion leaves no doubt, for it is further said: 'We think every consideration of the nature of the property and the things to be accomplished support the conclusion that this statute means to give to the assignees of the *original owner of the right to copyright an article* (italics ours) the right to take out the copyright secured by the statute independently of the ownership of the article itself.'"

This is a clear indication that all the owners could have assigned to Frohman was the right to take copyright here. This could only be done at that time by action contemporaneous with the copyrighting abroad. As we have seen, the English courts hold the author has no assignable rights entitling him either to copyright or common law remedies after publication abroad.

In *Caliga* v. *Inter Ocean Newspaper*, 215 U. S. 182, 188, the court distinctly announces its adherence to the rule that the statutory and common law rights do not co-exist, in these words:

> "This statutory right is obtained in a certain way and by the performance of certain acts

which the statute points out. That is, the author having complied with the statute and given up his common law right of exclusive duplication prior to general publication, obtained by the method pointed out in the statute an exclusive right to multiply copies and publish the same for the term of years named in the statute. Congress did not sanction an existing right; it created a new one. *Wheaton* v. *Peters*, 8 Pet. 591, 661."

This case in effect holds that the first attempt to obtain a copyright was a publication and put an end to common law rights.

The decision of the court below should be reversed.

Respectfully submitted,

CHARLES H. ALDRICH,
CHARLES R. ALDRICH,
CHARLES G. MCROBERTS,
L. E. CHIPMAN,
Attorneys for Plaintiff in Error.

15

GEN. No. 21,644 TERM No. 44

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1911.

Office Supreme Court U. S.
FILED
NOV 6 1911
JAMES H. McKENNEY,
Clerk.

RICHARD FERRIS,
Plaintiff in Error,
(Defendant below,)

vs.

CHARLES FROHMAN, CHARLES HADDON CHAMBERS and STEPHANO GATTI,
Defendants in Error,
(Complainants below.)

In Error to the Supreme Court of the State of Illinois.

MOTION OF DEFENDANTS IN ERROR TO DISMISS WRIT OF ERROR AND SUGGESTIONS IN SUPPORT THEREOF
AND
BRIEF AND ARGUMENT OF DEFENDANTS IN ERROR.

LEVY MAYER,
Attorney for Defendants in Error.

Chicago, Ill., Nov. 4. 1911.

GUNTHORP – WARREN PRINTING CO., CHICAGO

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1911.

RICHARD FERRIS, *Plaintiff in Error,* *(Defendant below,)* *vs.* **CHARLES FROHMAN, CHARLES HADDON CHAMBERS and STEPHANO GATTI,** *Defendants in Error,* *(Complainants below.)*	In Error to the Supreme Court of the State of Illinois.

MOTION OF DEFENDANTS IN ERROR TO DISMISS WRIT OF ERROR.

Now come the defendants in error, Charles Frohman, Charles Haddon Chambers and Stephano Gatti and move this court to dismiss the writ of error herein, on the ground that this court has no jurisdiction thereof, because no title, right, privilege or immunity is or was specially set up or claimed by the plaintiff in error, under the Constitution or any treaty or statute of, or commission held or authority exercised under, the United States, and no decision was rendered by the Supreme Court of Illinois, to

which the writ of error herein was directed, against any such title, right, privilege or immunity.

In support of the above motion said defendants in error herewith submit the accompanying brief and suggestions.

CHARLES FROHMAN,
CHARLES HADDON CHAMBERS, AND
STEPHANO GATTI,
Defendants in Error.

By LEVY MAYER,
Their Attorney.

Gen. No. 21644. Term No. 44.

IN THE SUPREME COURT OF THE UNITED STATES,

October Term, 1911.

Richard Ferris, *Plaintiff in Error.* (Defendant below) *vs.* Charles Frohman, Charles Haddon Chambers, and Stephano Gatti, *Defendants in Error.* (Complainants below)	In Error to the Supreme Court of the State of Illinois.

SUGGESTIONS ON BEHALF OF DEFENDANTS IN ERROR IN SUPPORT OF THE MOTION TO DISMISS THE WRIT OF ERROR HEREIN, AND BRIEF AND ARGUMENT OF DEFENDANTS IN ERROR.

MAY IT PLEASE THE COURT:

On June 11, 1902, complainants (defendants in error) filed their amended bill of complaint in the Superior Court of Cook County, Illinois, for an injunction restraining the defendant (plaintiff in error) from producing or performing a pirated copy of complainants' play entitled "The Fatal Card." (Rec., 18)*.

In the year 1894 complainant Chambers, and one Stephenson, both of whom were dramatic authors, composed a certain melodrama in five acts, entitled "The Fatal Card," which melodrama was original

*The record references made herein are to the printed record.

with said Chambers and Stephenson, and was worth many thousands of dollars to them as a literary product. The melodrama was written in manuscript form, and was never printed, published, or in any manner dedicated to the public use, except as hereinafter stated. Thereafter the firm of A. and S. Gatti (of which firm complainant Stephano Gatti is the surviving partner), acquired from the authors a one-third interest in the royalties to be derived from the play. (Rec., 31, 32.)

On June 14, 1894, complainant Frohman, a well-known producer of plays and a citizen of the United States, purchased from the authors the sole and exclusive American rights to the play for a period of five years. As this period expired in 1899 this license has no important bearing upon the present controversy. On March 25, 1895, Frohman purchased all the right, title and interest of Stephenson in and to said melodrama with the exclusive right to produce, perform and represent the same in the United States and Canada. The granting of this exclusive license and the transfer of Stephenson's interest was assented to by Chambers and the firm of A. and S. Gatti. At the time of the filing of the original bill herein (January 18, 1901) complainants were the sole and exclusive owners of said melodrama. (Rec., 32.)

Said melodrama was thereafter publicly produced in the principal cities of the United States and Canada under the personal supervision of Mr. Frohman and its production was a success, both artistically and financially. (Rec., 31.)

Thereafter one George E. McFarlane substantially copied complainants' play and transferred such copy to defendant Ferris, who proceeded to advertise and perform it under the same title in various places of amusement in many of the large cities throughout the United States, and made large profits therefrom, to the financial injury and detriment of complainants. This was done with full knowledge of complainants' rights in the premises, and without their consent. (Rec., 25.)

The Master in Chancery, to whom the cause was referred, found that complainants' play "is a melodrama of decided literary merit, and of very considerable monetary value," but concluded, that as complainants' play had been publicly performed on September 6, 1894 (previous to the purchase by Mr. Frohman) at the Adelphi Theater in London, England, by A. and S. Gatti, with the consent of Chambers and Stephenson, that that act under the British statutes hereinafter mentioned, constituted a publication of the play, which lost to the owners thereof their *common law rights* not only in England *but in the United States.* This conclusion of the master was overruled by the Superior Court which found that the melodrama "has never been published or otherwise dedicated to the public in the United States of America" (Rec., 24), and a decree was entered restraining defendant from in any manner producing, or performing, complainants' melodrama, or the McFarlane copy thereof, and ordering an accounting. (Rec., 26.)

From this decree an appeal was prosecuted to the

Appellate Court for the First District of Illinois where the decree of the Superior Court was reversed. (131 Ill. App., 307; Rec., 52-56.) The decision of the Appellate Court was thereafter reversed by the Supreme Court of Illinois, (238 Ill., 430; Rec., 61-70), the latter court holding that the complainants had the exclusive right to perform "The Fatal Card" in the United States, and that such right had not been lost by the performance of the play in England. To reverse this decision the present writ of error is prosecuted.

BRIEF.

I.

THIS COURT HAS NO JURISDICTION OF THE PRESENT WRIT OF ERROR.

Appleby v. *City of Buffalo*, 221 U. S., 524 (1911).

Waters-Pierce Oil Co. v. *Texas*, 212 U. S., 86 (1909).

Harding v. *Illinois*, 196 U. S., 78 (1904).

Howard v. *Fleming*, 191 U. S., 126 (1903).

Home for Incurables v. *New York*, 187 U. S., 155 (1902).

DeLamars v. *Nesbitt*, 177 U. S., 523 (1900).

Sayward v. *Denney*, 158 U. S., 180 (1895).

II.

THE PUBLIC PERFORMANCE IN ENGLAND OF A MANUSCRIPT PLAY WHICH UNDER THE BRITISH STATUTES IS MADE A PUBLICATION AND DEPRIVES THE AUTHOR OF HIS COMMON LAW RIGHT OF EXCLUSIVE REPRESENTATION, DOES NOT DEPRIVE THE AUTHOR OF SUCH COMMON LAW RIGHT IN THIS COUNTRY WHERE PUBLIC PERFORMANCE IS NOT DEEMED A PUBLICATION.

Crowe v. *Aiken*, 2 Biss., 208; Fed. Cas., No. 3441; 4 Am. Law. Rev., 450 (Drummond, J., 1870).

Palmer v. *De Witt*, 2 Sweeney, 530; 40 How. Pr., 293 (1870) (Affd., 47 N. Y., 532—1872).

~~Pr., 293 (1870) (Affd., 47 N. Y., 532—1872).~~

Tompkins v. *Halleck*, 133 Mass., 32 (1882).

Drone on Copyright, pp. 118-121, 554, 555, 574, 576.

Wandell, Law of the Theater, 479.

25 Cyc., 1497.

a.

AT COMMON LAW AND BEFORE THE PASSAGE OF COPYRIGHT STATUTES AN AUTHOR HAD AN EXCLUSIVE PROPERTY RIGHT IN HIS MANUSCRIPT.

Cases Point II *supra*, and

Drone on Copyright, pp. 102 *et seq.*

b.

THE PUBLIC PERFORMANCE OF A MANUSCRIPT DRAMA IS NOT IN THIS COUNTRY A PUBLICATION, BUT THE AUTHOR STILL RETAINS HIS COMMON LAW RIGHT TO ITS EXCLUSIVE REPRESENTATION.

Drone on Copyright Law, p. 119.

Tompkins v. *Halleck*, 133 Mass., 32 (1882).

Palmer v. *DeWitt*, 2 Sweeney, 530 (1870); affd. 47 N. Y., 532 (1872).

Boucicault v. *Hart*, 13 Blatch., 47; Fed. Cas. No. 1692 (Mr. Justice Hunt—1875).

Crowe v. *Aiken*, 2 Biss., 208; Fed. Cas. No. 3441 (1870).

Aronson v. *Fleckenstein*, 28 Fed., 75, 78 (Blodgett, J.—1886).

25 Cyc., 1497, and cases cited.

c.

A DIFFERENT RULE PREVAILS IN ENGLAND BY STATUTE.

Stat. 3 & 4 Will. IV, Chap. 15.

Stat. 5 & 6 Vict., Chap. 45, Sec. 20.

Boucicault v. *Delafield,* 1 Hem. & M., 597 (1863).

Boucicault v. *Chatterton,* 5 Chan. Div., 267 (1876).

Drone on Copyright, pp. 119, 574, 605, 656.

Macgillivray, Law of Copyright, pp. 126 *et seq.*

Scrutton on Copyright, 3rd Ed., p. 72 *et seq.*

d.

THE PROVISIONS OF THE ENGLISH STATUTES IN REGARD TO REGISTRATION OF DRAMATIC COMPOSITIONS ARE PERMISSIVE ONLY.

Drone on Copyright, pp. 280, 603.

Macgillivray, Law of Copyright, pp. 47, 133.

Scrutton on Copyright, 3rd Ed., p. 88.

8 Halsbury's Laws of England, p. 179.

Russell v. *Smith,* 12 Q. B. (Ad. & El. N. S.), 217 (1848).

Clark v. *Bishop,* 27 L. T., n. s., 908 (1872).

e.

THE LEX DOMICILII CANNOT FIX THE STATUS OF LITERARY PROPERTY WHERE THE AUTHOR SEEKS TO ENFORCE RIGHTS IN RESPECT THERETO IN A FOREIGN COUNTRY.

1 Morgan Law of Literature, p. 479.

Drone on Copyright, p. 581.

Story's Conflict of Laws, Sec. 550.

Crowe v. *Aiken, supra.*

Palmer v. *De Witt,* 47 N. Y., 532 (1872).

Baglin v. *Cusenier Company,* 221 U. S., 580 (1911).

Minor v. *Cardwell,* 37 Mo., 350 (1866).

ARGUMENT.

I.

To give color to the claim that a Federal question is involved defendant contends (brief, pp. 15 *et seq.*) that the McFarlane play is an "adaptation" of complainants' play, and, therefore entitled to protection under the copyright statutes of the United States. This contention entirely disregards the findings of the Superior Court that defendant's play "is a PIRATED copy" of complainants' play, and that by taking the name of complainants' melodrama, and using it as the name and title of the McFarlane play, defendant "intended to and did deceive the theater going public into believing that his said play was the melodrama of complainants, to the great injury of the theater going public and these complainants." (Rec., 25.)

The Supreme Court found "that there is no controversy as to the facts" (Rec., 61) and that "it is not denied that the Master's conclusion that the McFarlane play 'is substantially identical with the play claimed by the complainants' was justified by the evidence." (Rec., 62.) Defendant's play is a plain piracy, and upon this record this statement cannot be disputed. The sole question before this court is whether or not the *common law rights* of an author of a *manuscript* play have been lost in this country by a performance upon the stage in England.

Complainants' bill was based entirely upon the

claim that their common law right of literary property in their unpublished manuscript drama had been infringed by the public performance of defendant's play. Defendant in his answer, while referring to the fact that his play was copyrighted here, claimed no right in that respect, but set up in defense (1) that his play was not substantially identical with or a copy of complainants play and (2) that complainants had lost their exclusive rights here by the public performance in England. (Rec., 6, 20, 30.) Before the case had run its course in the state court defendant conceded that his play was substantially identical with complainants' play (Rec., 62-65), and defense was thereafter made solely upon the other ground.

The record conclusively shows that at no time was there any right, privilege or immunity set up or claimed by the defendant under any law or treaty of the United States, and neither the validity, construction or applicability of any law or treaty was made the subject or dispute in any court. In their bill complainants simply alleged that defendant had secured a copyright under the laws of the United States under the name and title of "The Fatal Card." In his answer defendant merely admitted this allegation, and made no claim of right or privilege by reason thereof. (Rec., 7.) In no other part of the record does the defendant make any reference to his alleged copyright. It is clear, therefore, that this court has no jurisdiction of the present writ of error.

Appleby v. *City of Buffalo*, 221 U. S., 524.

Waters-Pierce Oil Co. v. *Texas,* 212 U. S., 86.
Harding v. *Illinois,* 196 U. S., 78.
Home for Incurables v. *New York,* 187 U. S., 155.
DeLamars v. *Nesbitt,* 177 U. S., 523.
Sayward v. *Denney,* 158 U. S., 180.

Nor is even a reference made in the record to any treaty of the United States with Great Britain, except in the opinion of the Supreme Court of Illinois where *arguendo* the court makes reference to such treaty.

Again the opinion of the Supreme Court does not deny or assume to deny any right or privilege claimed by the defendant under any statute or treaty. And even if such opinion fully considered defendant's rights in connection with such treaty or law it would not avail the defendant here, as no claim to protection was made thereunder. (*Howard* v. *Fleming,* 191 U. S., 126.)

It is true that in this court error is assigned that the judgment of the Illinois Supreme Court deprives defendant of rights under the Federal laws and treaties, but it is well settled that assignments of error in this court cannot be looked to for the purpose of determining whether a Federal question is involved.

Appleby v. *City of Buffalo, supra.*

It was also squarely held by Mr. Justice Hunt in *Boucicault* v. *Hart,* 13 Blatch., 47, Fed. Cas. No. 1692, that the right of the author of a manuscript

drama to enjoin the public performance of the same by another without his permission, involved only the assertion of common law rights which could not be made the basis of a bill in the Federal Court on the ground that a Federal question was involved.

We submit that the writ of error should be dismissed.

II.

The facts in the present record are undisputed, and there is involved but the single question as to whether or not complainants have lost their common law rights in the United States in the melodrama, "The Fatal Card," on account of the public representation of the same at the Adelphi Theater in London on September 6, 1894.

At common law, an author of a book or play has an exclusive property right in his manuscript which is as absolute as the right of the owner of any chattel. He can not be compelled to print or publish or to permit others to enjoy it, and any use of his property without his consent is a violation of his rights. (Drone on Copyright, pp. 102, *et seq.*) This right exists until *publication*. Whatever rights exist after publication must now be found in some copyright statute.

Section 4952, Rev. Stat. U. S., 1874, provides for the securing of a copyright on literary productions, as follows:

> "Any citizen of the United States or resident therein who shall be the author * * * of any book * * * dramatic or musical com-

> position * * * shall, upon complying with the provisions of this chapter, have the sole liberty of printing, reprinting, publishing, completing, copyright, executing, finishing and vending the same; and *in the case of a dramatic composition of publicly performing or representing it,* or causing it to be performed or represented by others. * * *"

The latter clause applies only where the dramatic composition is printed and published. (*Boucicault* v. *Hart, supra.*) Prior to July 1, 1909, there was no provision in the statutes of the United States which provided for securing the exclusive right to perform a drama except when such drama was *printed in book form* and a copyright was secured on the printed book.

The new Copyright Act (in force July 1, 1909,—the decision in the present case was rendered by the Supreme Court of Illinois February 19, 1909) provides that any person entitled thereto, upon complying with the provisions of the Act, shall have the exclusive right:

> "(a) To print, reprint, publish, copy and vend the copyrighted work; * * *
>
> (d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever;"

This section differs from the corresponding sec-

tion in the old Act in that it apparently gives the author of a drama who does not desire to produce the same in book form, the liberty to copyright his manuscript by the deposit with claim of copyright (as provided in Sections 11 and 12 of the Act) of one complete copy of his dramatic composition.

The Act, however, in Section 2 thereof provides

> "That nothing in this Act shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor."

It is settled law in the United States that the public performance of a *manuscript* play does not constitute a publication thereof, or deprive the owner of his common law right to exclusively perform the same. (Drone on Copyright, p. 119; *Boucicault* v. *Hart,* 13 Blatch., 47, Fed. Case, No. 1692, and other cases under Brief, Point II b, *supra.*) This principle is decisive of the present case. For certain purposes the British statutes declare that the public representation of a play is equivalent to the first publication of a book. The entire claim of defendant is based upon this statutory provision. If the distinction between the publication of a *printed* book and the performance of a *manuscript* play is kept in mind, there will be no difficulty in arriving at a correct solution of the present question. Except with respect to the *performing rights* in manuscript plays the acts which now constitute publication are the same in the United States as in England and the place of publication is immaterial. As stated,

the public performance of a manuscript play is not a publication in this country nor a waiver of common law rights. The same rule prevailed in England prior to the passage of the statute hereinafter referred to.

Drone, on Copyright, p. 119, states the doctrine thus:

> "No English or American statute regulating copyright in a literary composition takes effect until the composition is published in print, or by the public circulation of copies. Until such publication takes place, the common law rights continue in full force. * * * This statement must be qualified in the case of dramatic compositions under the English, BUT NOT THE AMERICAN LAW. In the United States, there is no statute governing the right of representing or performing a manuscript dramatic or musical composition. Hence, the common law rule applies and the owner's rights are not lost by the public representation or performance of such composition. The law was the same in England until the 3 & 4 Will. IV. c. 15, was passed, which, as extended and amended by the 5 & 6 Vict. c. 45 s. 20, now regulates the exclusive right of representing and performing dramatic and musical compositions. These statutes apply to manuscript as well as to printed productions, and, within their meaning, the public representation or performance of a manuscript composition is a publication."

The statute of 3 & 4 Will. IV. Chap. 15 was passed in 1833. This statute is set out in full in Drone on Copyright, p. 656. That statute conferred upon the author of a dramatic composition *not printed or published,* the sole liberty to represent and perform the same throughout the British Dominions without limitation as to time, although counsel for de-

fendant erroneously claim (br., p. 29) that the period was limited to twenty-eight years. This statute was amended by the Act of 5 & 6 Vict. Chap. 45, Section 20 of which provided

> "that the sole liberty of representing or performing * * * any dramatic piece or musical composition shall endure and be the property of the author thereof, and his assigns for the term of this Act provided for the duration of copyright in books.* * *"

The duration fixed for the copyright in books was forty-two years, or for the life of the author and seven years after his death, whichever period might be the longer.

Macgillivray, Law of Copyright, pp. 126, *et seq.*

Drone on Copyright p. 605.

8 Halsbury's Laws of England, 179.

To determine when this period should begin Parliament attached the proviso to section 20, *supra,* that the "first publication, representation or performance of any dramatic piece or musical composition shall be deemed equivalent *in the construction of this act,* to the first publication of any book."

The effect of this statute, as construed by the English courts, is to make the public performance of a drama a publication; and, in lieu of the exclusive *common law* right of the author in the British dominions to perpetually perform, the statute *automatically* substitutes its protection, and gives to the author the exclusive right to present his drama for the statutory period.

Boucicault v. *Delafield,* 1 Hem. & M., 597 (1863).

Boucicault v. *Chatterton,* 5 Ch. Div., 267 (1876).

Drone on Copyright, p. 574.

Prior to the Statute of 3 & 4 Will. IV, Chap. 15, there was no statute in England protecting playwright. Consequently if before that time a dramatist published his play *in print,* he lost the exclusive right to represent the same upon the stage even though he had secured a copyright therefor.

Drone on Copyright, pp. 83 *et seq.,* 601, 602, 554.

In *Boucicault* v. *Delafield, supra,* a bill was filed by the author of a manuscript drama to restrain the defendant from producing a piracy thereof. It appeared that plaintiff first represented his own play in New York, and this was claimed to be a publication in so far as performing rights were concerned under the British statutes above referred to. Reference was made to the act of 7 and 8, Vict. Chap. 12, Sec. 19, which provided:

> "Neither the author of any book, nor the author or composer of any dramatic piece or musical composition * * * which shall after the passing of this act, be first published *out of Her Majesty's dominions,* shall have any copyright therein respectively, *or any exclusive right to the public representation or performance thereof.*"

Section 19 was passed to carry out the policy of the British Parliament, and compel authors desirous of securing British copyrights, to make their first publication within the British dominions.

In *Boucicault* v. *Chatterton, supra,* the facts were

substantially similar. The only question in either case was whether or not the public performance of the play in the United States constituted a publication *within the meaning of the British statutes,* in so far as performing rights were concerned, and the court rightfully held that such performance amounted to such a publication, but as the publication had been made outside of the British Dominions, Section 19 of the Act of 7 & 8 Vict., *supra,* became operative. If the performance had been within the British dominions, the authors would have received the benefit of the British statutes, and there would have been automatically substituted for the common law rights in their manuscript, the exclusive right to perform the play for the statutory period. To conclude from these decisions that because, by virtue of specific, positive, statutory provisions, a performance in America constitutes an abandonment of the exclusive right of performance in England, that necessarily a performance in England must be an abandonment of the exclusive right of performance in America, *where a rule contrary to the British statutory rule prevails,* is without support in reason or authority.

Whatever rights complainants have in this country, exist independently of the British statutes. Those statutes, not operating extra-territorially, could confer no rights on the authors which they could exercise in this country. Can the British statutes, by automatically substituting for the common law right of the author in the British Dominions, the exclusive right under the statute to there perform for the limited statutory period, have the

effect of terminating such common law rights not only in the British Dominions, but in the United States and elsewhere in places where the benefits and protection of the British statutes could not avail? In other words, can the British statutes deprive the authors of their common law rights in America, when admittedly such statutes are not operative and furnish no protection here?

Previous to the present controversy, the question here involved has been before the courts in but three reported cases, in all of which it was decided that the performance of a play in England can not in any way affect the author's common law rights in this country.

The question was squarely decided in *Crowe* v. *Aiken* (January, 1870, by Circuit Judge Drummond), 2 Biss., 208, Fed. Cas., No. 3,441, 4 Am. Law. Rev., 450. The reasoning of that decision is unanswerable.

There a bill was filed to enjoin the performance in Chicago of complainant's play "Mary Warner." The play had been written especially for and the principal part was to be personated by complainant's wife, an actress. In pursuance of a contract between the author (Tom Taylor) a British subject, and complainant, the play was not to be printed or published, but merely represented on the stage. After the play was completed, the author duly transferred to complainant the play and manuscript together with the exclusive right to its representation on the stage in the United States for a period of 5 years from June 1, 1869. The play was first

performed at the Haymarket Theatre in London in June, 1869, and was *afterwards* brought by complainant to the United States where it was successfully produced. The play was never *printed* with the consent of either complainant or the author, or published by either of them otherwise than by representation upon the stage.

The defendant among other defenses set up that the play had been publicly performed in London and that therefore under the British statutes complainant had waived his common law rights here. We call particular attention to the fact that, as here, the British statutes were made the basis of the defense. One affidavit particularly stated that deponent "is advised that by Sec. 20 of 5 & 6 Vict. Chap. 45 'the first representation of a dramatic piece is deemed equivalent to the first publication of a book.'" The court after stating the facts said (6 Fed. Cas., 904, 906):

> "Mr. Taylor, then, was the proprietor of the drama "Mary Warner," when finished, and when transferred to the plaintiff, the latter became the proprietor on the terms of the transfer. Has the right of property been lost? * * *
>
> The representation of a play on the stage was decided in England before the statute of 5 & 6 Vict., *not* to be a publication. * * * There was some question whether the author of a play had, at common law, the sole right of representation; but, *so long as the play existed in manuscript*, and was unpublished, and not in some way dedicated to the public, *the sole right of representation or performance would seem to follow from the exclusive right of property*. But the 20th section of the statute 5 & 6 Vict. chap. 45 put an end to this question by declaring that the first public representation or performance of any

dramatic piece should be deemed equivalent, *in the construction of the act*, to the first publication of any book, and I understand it has been decided in England, that the public performance, even in a foreign country, of a play of which an English subject is the author, defeats his claim to a copyright under the British statutes.

It is insisted that as, by this statute, representation was publication, the play 'Mary Warner,' by performance in England, was published there, and all right of property in the play was consequently lost, as well there as in the United States. This necessarily leads to the conclusion—and that is substantially the position of the defendant's counsel—that there is no right of property in this country in the play except that conferred by the statutes, and particularly that of August 18, 1856. (The copyright statute of the United States.) I do not understand that the authorities have gone that far, and it does not follow, because his claim under the statute is gone, that everything is lost. *He may still stand on his natural, inherent right as the author and creator of the play, and maintain that right until, in some mode, in reason or by statute, it is dedicated to the public.* * * *

* * * IT FOLLOWS FROM WHAT HAS BEEN SAID THAT A DEFINITION OF THE WORD REPRESENTATION BY A BRITISH STATUTE IS NOT OPERATIVE AS SUCH IN THIS COUNTRY. And in *all* the cases which have arisen here, recently, upon the rights of authors to unpublished plays written by Englishmen, the objection that their rights in this country were destroyed in consequence of the clause already referred to in Section 20, c. 45 of 5 & 6 Vict., seems not to have been taken either by counsel or the court."

In *Palmer* v. *DeWitt*, 2 Sweeney, 530, 40 How. Prac., 293, decided December, 1870, (affd. 47 N. Y.,

532), it appeared that one Robertson, an Englishman, was the author of a drama called "Play" and prior to February 1, 1868, had sold to the plaintiff the exclusive right to perform and print it throughout the United States. The drama was for the first time performed in the Prince of Wales Theatre, in London, on February 15, 1868, under the sanction of the author. The defendant, in disregard of the plaintiff's proprietary interest in the play printed the drama and offered the printed copies for sale. The plaintiff applied for an injunction. Among other defenses interposed the defendant set up that the play had been published and the common law rights therein lost by the London performance. The point here in controversy was squarely raised as is apparent from an examination of the briefs in the report of the case as found in 2 Sweeney, 530. It will also be noticed that the attorney for the defendant was the attorney for the defendant in *Crowe* v. *Aiken, supra,* and that the decision was rendered *subsequent* to the decision in *Crowe* v. *Aiken.*

In reversing the judgment below, and granting the plaintiff an injunction, the court (composed of three judges) held that public performance of a drama never of itself terminates the author's common law rights in America and said (p. 554):

> "The case most relied on by the defendant, (*Boucicault agt. Delafield*), arose under the English statute of copyright. * * * *Words used in a statute to define the meaning of particular parts of it, are never extended beyond the statute, and have, therefore, no controlling effect, except in the*

interpretation of the statute. They define the intent and meaning of the lawmakers, and are made to extend the statute to cases not otherwise recognized as coming within its purview. But the legislature cannot, by merely expressing the intent of the law in respect to a particular statute, affect the meaning of words used in other statutes, *or deprive them of the significance which they receive from settled principles of the common law* * * *.

The case, therefore, of *Boucicault agt. Delafield,* is not an authority upon any question of actual or constructive publication *not arising under the English copyright law. Nor is it entitled to any more weight than the statute itself, which is a mere legislative interpretation of what, for certain purposes, shall be deemed a publication of a dramatic piece."*

Crowe v. *Aiken* was also approved by the court.

In the Court of Appeals where the decree was affirmed, the point was not decided and apparently not even raised, and the decision turned upon other grounds. This defense was evidently abandoned by the defendant's counsel after two adverse decisions.

Tompkins v. *Halleck,* 133 Mass., 32, decided 1882, was a bill to restrain defendant from representing at his theatre in Boston a drama entitled "The World." The drama was originally written in England, where after being presented, it was sold to one Colville in New York, who caused it to be altered and amended to suit the presumed taste of American audiences. It was successfully produced in New York, and was then assigned to plaintiffs, with the exclusive right to represent the same in the New England States. The drama was not copyrighted or printed. The defendant produced the

play in his theatre in Boston, under a contract with one Byron who had committed it to memory, after frequent attendances at the New York production. Plaintiffs thereupon brought a bill to enjoin defendant from further producing the play. It is apparent that the facts in the case were precisely similar to those in the case at bar. The play had been performed in England and subjected to the operation of the statute of 5 & 6 Vict. c. 45, as here, and the rights of the plaintiffs in America were based solely on the common law.

The court held that the public representation did not constitute a publication, and that as no member of an audience had any right to transcribe an unpublished drama from memory and thereafter reproduce it, the injunction would issue. The court said (p. 34):

> "The St. of 8 Anne, c. 19, which is the foundation of the English copyright law, while it included plays and dramatic compositions, protected the author in his exclusive right to publish in print, but not in that of public representation of his work. It has since been modified by the St. 3 & 4 Will. IV, c. 15, and subsequently by that of 5 & 6 Vict., c. 45. * * *
>
> That the right of property which an author has in his works continues until by publication a right to their use has been conferred upon or dedicated to the public, has never been disputed. * * * The *representation* of an *unprinted* work upon the stage *is not a publication* which will deprive the author or his assignee of his rights of property therein. * * * Nor can we perceive why it should deprive him of his right to restrain the public representation thereof by another."

To the same effect see Wandell, Law of the Theattre, 479, and 25 Cyc., 1497, note 56.

In the authoritative work of Drone on Copyright, the correctness of our position is frequently recognized. Thus on page 574 it is said:

> "It is then clear, both on principle and authority, that the property in a manuscript play is not injuriously affected by authorized public representation, unless by the operation of some statute. Now, in the United States, there is no statute which can have this effect, because there has been no legislation relating to *manuscript* dramatic compositions. *Statutory playright is secured in published compositions alone, and representation is not publication within the meaning of the statute.* When a dramatic composition is published *in print,* the owner's common-law rights are destroyed by operation of the statute, to which he must look for protection. But property in a manuscript play is governed exclusively by the common law, and is in nowise affected by any statute. Hence, *in the United States, the owner's rights in a manuscript play are not prejudiced by its authorized public representation.*"

And on page 576, it is said:

> "*In England,* the common law right to the exclusive representation of a manuscript play, is lost by the public performance of the piece, and that thereafter the only protection to which the owner is entitled is that given by the statute."

In other parts of his work, Mr. Drone uses language equally significant. (See pp. 118-121 of Drone, and p. 16 of this brief, *supra.*)

Counsel for defendant attempt ineffectually to distinguish the cases relied upon. Thus, of *Crowe* v.

Aiken, they say (br., p. 64) that "there is throughout this opinion an assumption that statutory copyright had not been obtained;" and of *Tompkins* v. *Halleck,* they say (br., p. 61) that it "is based upon the express assumption that the play was not copyrighted." We fail to understand these alleged distinctions. No copyright has been taken out in the present case and the manuscript was never printed or circulated. Of course, if a copyright (*i. e.,* the right to multiply copies) of the printed drama was taken out in Great Britain, that would under our decisions be an abandonment of common law rights here. This results not from the fact of British copyright, but because to secure the copyright the play must be printed for circulation, which act under our laws amounts to publication.

Counsel, in stating the facts in *Crowe* v. *Aiken,* say that the public performance in London took place after the author had assigned his common law rights in the United States to the complainant. An examination of Judge Drummond's opinion (upon which we are content to rest our present case) will demonstrate that Judge Drummond placed no reliance upon, and did not even call attention to that fact. He had the present question squarely before him, and in the opinion, which evidences great care and thorough consideration, he held that a public performance in England in no way affected the author's common law right in this country, and that the definition of the word "representation" (publication) in the British statute, *is not operative as such in this country.*

Of *Crowe* v. *Aiken,* counsel for defendant also

say that they believe the opinion erroneous, "if public performance *apart from registry,* under the proper construction of the English act, there divests common law rights, and invests the owner with statutory rights." (br., 64.) Counsel overlook the fact, that, under the British statute, the registry of the manuscript drama is not a condition precedent to the exclusive right of the author to perform during the statutory period, or to restrain infringement. In other words, the registry provisions are permissible only, and in no way affect the author's rights. Upon the first performance in Great Britain of any manuscript drama, the protection of the statute is awarded automatically, and the common law rights in Great Britain cease.

The rule is laid down in Macgillivray on Copyright, p. 133, as follows:

> "The provisions as to registration of dramatic pieces, are therefore merely permissible, and are in no way a condition precedent either to the *performing right* or to the right of action upon infringement."

To the same effect see:

Drone on Copyright, pp. 280, 603.
Macgillivray, Law of Copyright, p. 47.
Scrutton on Copyright, 3rd Ed., p. 88.
8 Halsbury's Laws of England, p. 179.
Russell v. *Smith,* 12 Q. B., 217 (1848).
Clark v. *Bishop,* 27 L. T. (n. s.), 908 (1872).

Of *Palmer* v. *DeWitt,* counsel say that the question under discussion is not involved and they cite the decision as reported in the Court of Appeals. The point here involved was before the court (three

judges) in the case as reported in 2 Sweeney, 530, and 40 How Prac., 293, and that decision was affirmed in 47 N. Y., 532. And as we have already said, in that case the attorney for the defendant was also the attorney for the defendant in *Crowe* v. *Aiken*, and it is apparent that the claim which is made here was abandoned by the defendant's counsel in the Court of Appeals, as the decision in the latter court turned upon other grounds.

Counsel also claim that the British statute is operative here to deprive the author of his common law rights to the manuscript in question, on the theory that literary property, being personal property, is governed by the *lex domicilii*. It by no means follows that because "The Fatal Card" was an English play, and its authors subjects of Great Britain, the rights of such authors *in this country* are governed by the provisions of the British statute. These facts do not fix the legal status of literary property in a manuscript throughout the entire world. Whatever the rights of the authors of the manuscript are in a particular country, must be determined by the laws of that country. The British Parliament has the right to declare the author's status throughout the British Dominions, but it can not in any way do so outside that territory.

As stated in Vol. 1 Morgan on the Law of Literature, p. 469, in discussing the nature of property rights in manuscript dramas:

> "The manuscript may be a personal chattel on this side of the water (*i. e.*, America), although its contents have been copyrighted on the other."

That the rule of *lex domicilii* has no application here, is demonstrated by the decisions which hold that aliens have the same rights as citizens with respect to literary property. Thus, in Drone on Copyright, p. 581, the author states:

> "The common law makes no distinction between a native and a foreigner. In nearly all the cases wherein the American courts have protected the common law property in unpublished plays, the plaintiffs have been the assignees of foreign dramatists."

The same conclusion is reached in *Crowe* v. *Aiken, supra,* and *Palmer* v. *DeWitt,* 47 N. Y., 532.

If aliens must or may avail themselves of the provisions of the British copyright statutes, or the United States copyright statutes, in order to secure protection, then it necessarily follows that the law of the owner's domicile can have no application.

Counsel has not referred to a single case wherein it has been held or even intimated that the performance of an English manuscript play in Great Britain has any effect on the common law right of the author to exclusively perform his play in any country not subject to the British statutes. To hold otherwise creates this extraordinary situation: The author, by performing in England, obtains for himself, by virtue of the statute, the exclusive right to produce his play for the statutory period, in substitution for his common law rights in the British dominions. Opposing counsel admit that the British statutes can have no extraterritorial effect, and that the author obtains, in lieu of his common law right in the British dominions, the benefits of the British statutes; but at the same time claim that the author loses his

common law rights in the United states. In other words, counsel would give extra-territorial effect to the British statutes, for the purpose of wiping out the common law rights of the authors and owners here, and deny the efficacy of such statutes for any other purpose. If the British statutes do not confer any benefit on the owners here, it is equally true they can impose no burden.

If the *lex domicilii* applies, why does counsel discuss the necessity of International Copyright arrangements? Why struggle with the question whether the alien should be placed on a parity with the citizen, if the alien has attached to his person the protection of the copyright statutes of his own country? If the British laws apply here, then why has not the author, by performing in England, acquired the exclusive right to perform in this country for a period of at least 42 years? If the *lex domicilii* is applicable for one purpose it must on principle be applicable for all purposes. For certain purposes (such as taxation, succession, etc.), personal property is sometimes considered as having a *situs* at the domicile of its owner. This rule, however, has reference to *movable* property. Strictly speaking, literary property can have no *situs*. Situs is defined (Bouvier's Law Dictionary) as "situation, location." The right of literary property is an intangible one. It can not be marked locally with any degree of discrimination or precision. As Lord Mansfield said in *Millar* v. *Taylor*, 4 Burr. 2396 (quoted in 210 U. S., 347), literary property is "a property *in notion*, and has no corporeal tangible substance," and "it relates to *ideas* detached from any *physical* existence."

This court in *Pullman Palace Car Company* v. *Pennsylvania*, 141 U. S., at p. 22, quotes Story's Conflict of Laws, Sec. 550, as follows:

> "Although movables are for many purposes to be deemed to have no *situs*, except that of the domicil of the owner, yet this being *but a legal fiction, it yields whenever it is necessary for the purpose of justice that the actual situs of the thing should be examined.*"

Analogously, in *Baglon* v. *Cusenier Co.*, 221 U. S., 580, this court held that a French law could not have any extra-territorial effect upon trade-marks used in connection with a business carried on outside of France.

See also *Minor* v. *Cardwell*, 37 Mo., 350, where the court said that statutory rules of other states fixing the character of personal property cannot "operate *ex proprio vigore* in opposition to the well settled rule of our own law."

We deem it unnecessary to review the numerous decisions quoted by opposing counsel. They deal only with the question of the effect of a publication of a book in print. Thus in *Boucicault* v. *Wood*, Fed. Cas. No. 1693, Judge Drummond (who decided *Crowe* v. *Aiken*), said at p. 992:

> "There is evidence tending to show that these two plays were *published*, that is, *printed*, and that this publication was made in England."

The distinctions are well summed up by Drone on Copyright, pp. 554, 555, where it it said:

> "The law has been settled to the effect that, by publication in print, the owner's common law property is lost, and that in a work so published he has no other rights than those secured by statute. Hence, a dramatist may have a

statutory but no common law right to the exclusive representation of a drama which he has published in print. But the exclusive right of the owner publicly to represent a manuscript play exists by the common law, unless such public representation by operation of the common law or by force of some statute, works an abandonment of the right.

The question then, is raised whether the comman-law property in a manuscript play is lost or prejudiced by the public performance of the play. * * *

Since the 3 & 4 Will., IV, c. 15, was passed in 1833, the right of representing manuscript as well as printed plays has been secured by statute in England; and since 1842 there has been a statutory provision declaring that the first public representation of a dramatic composition shall be equivalent to the first publication of a book. The decisions in *Boucicault* v. *Delafield* and *Boucicault* v. *Chatterton*, in which it was held that an author forfeits his title to English playright in a manuscript drama by first representing it in a foreign country, were governed by the above and other statutory provisions. Hence, *these authorities have no bearing on the question relating to the common-law rights of dramatists in the United States.*"

The entire argument of counsel fails, to discriminate between the principles which are applicable to the printing and circulation of books and those applicable to the performance of manuscript plays. A publication *in print* of a drama is a publication both here and in England, but this is because the decisions with respect to what constitutes publication of a book are the same in both countries. (Drone on Copyright, pp. 118-119.) Thus, where an author takes out a copyright, (*i. e.*, the right to multiply copies) of a book in England, without simultaneously

complying with the American copyright laws, he loses his common-law right here, and his right to a copyright, because in order to secure his English copyright he is required to make such a publication as according to the doctrine of our courts is an abandonment of his exclusive rights. In other words, the author loses his rights here not because he has taken out an English copyright, but because in securing that copyright he has performed acts which, under the doctrine of the American courts, constitute an abandonment of common-law rights here. The courts here in deciding what constitutes a *publication* of a book, do not look to the British statutes or decisions, but only to the fact that the particular book has been *printed* and *circulated*, and they reach the same result whether such publication takes place in this country or abroad.

But the situation with respect to the performing rights in a manuscript play is entirely different, and it is this difference which renders the entire argument of counsel inapplicable. As stated, the American decisions unanimously hold that performance here of manuscript dramas does *not* constitute a publication. If the play is published, the common-law rights of the author are lost. Whether the performance of a play constitutes such a publication *must be determined by our own law* and not by reference to the British statutes or decisions. In considering the question in this country as to what constitutes the publication of a book, it would be entirely immaterial if the British statute provided that the printing and circulating of a book was *not* a publication, and it is equally immaterial

that the British statute does declare that public performance of a manuscript drama is for certain purposes a publication *in Great Britain.*

Counsel have referred at length to numerous presidential messages, and congressional committee reports, which deal with the subject of the necessity of international copyright arrangements. We do not see how these documents have the remotest bearing upon the present question, as they deal solely with the publication of *printed* books. They grew out of the fact that foreigners residing abroad, were by our statutes, denied the right to obtain a copyright (*i. e.*, the right to multiply copies) in this country. (See Drone on Copyright, p. 95.) Foreigners, however, possessed common-law rights in their manuscripts here while the same remained *unprinted,* and could restrain any other person from pirating the same. The inability of the foreign author to obtain the exclusive right to multiply copies here was obviated by the passage of the Act of March 3, 1891 (26 Stat., 1110), and the proclamations of the president in connection therewith. (27 Stat., 981.)

Counsel say that the decision of the Supreme Court of Illinois is at variance with the intent of the so-called international copyright arrangements for the reason that the rule as to what constitutes a publication of a manuscript play is not the same in both countries. The intent of such arrangements, however, is to put citizens and foreigners upon a parity. There is no discrimination merely because the rule as to what constitutes a publication of a manuscript drama is not the same in both countries. The rule

is applied in each country to citizens and foreigners alike. An Englishman (as well as an American) has common law rights in a manuscript drama in this country, even though the drama has been performed in England, and neither an Englishman nor an American can claim statutory rights in England if the performance takes place outside of the British dominions. There is nothing in the International Copyright Act declaring that when American courts have the question of publication before them, they are bound to apply the definition thereof contained in a British law rather than that established by the decisions of the courts here.

Counsel claim that common law rights and statutory rights of the author in literary property cannot co-exist. But if under our decisions the performance of a manuscript play is not a publication, there is no reason why common law rights in such manuscript play cannot co-exist *in this country* with statutory rights *in Great Britain*.

Counsel (br., 13) comment in passing upon the fact that Mr. Frohman produced no written assignment of Stephenson's interest in the English playright. If this be an objection it cannot be raised in this court, as the record shows that counsel made no such point in the lower courts, all of which have found that complainants had the exclusive property in the play. It is true that the British statute provides that an assignment of the statutory playright must be in writing, but Mr. Frohman does not claim any right so far as the United States is concerned, by virtue of any assignment of the English playright. The English playright only extends to the British

dominions. What Mr. Frohman does claim is the ownership of Stephenson's interest in the common law rights in the play in this country. But even if it were the English playright that was involved, the fact that the English registry showed no written assignment thereof, would be of no consequence, as, under the British law, an assignment of the English playright to be effective need not be registered.

8 Halsbury's Laws of England, 181.

It is also well settled that the assignment of common law rights in a manuscript need not be in writing.

Drone on Copyright, pp. 104, 581.

As the author states (p. 104):

> "It has never been disputed, and is well settled, that the literary property in an unpublished work may be transferred by word of mouth."

Counsel, throughout their entire brief, have treated the present question as one of *copyright* and have overlooked the admitted fact that "The Fatal Card" at all times remained in manuscript form. It will not be disputed that if the statute of 5 and 6 Vict., Ch. 45, were out of the case, the present piracy could not be defended. The performing rights of the authors in their manuscripts would in such case be the same in both England and the United States, for the reason that under the *decisions* of both countries, public performance would not be a publication. Suppose, however, that the decisions in the United States were to the effect that a public performance *was* a publication, and a contrary rule prevailed in England, could it be for a moment con-

tended that inasmuch as the author of the play was an Englishman, the English decisions or statute should control? Or suppose that the first public performance of "The Fatal Card" took place in New York. This under the English decisions would constitute a publication and deprive the author of his common law rights in England. But could it be said that the common law rights in this country were destroyed? Yet there is no difference in principle between the supposed case and the present situation.

It, necessarily follows, therefore, that the question as to what constitutes a publication, whether of a book or a play, must be determined by the law of the place in which the question arises.

As the Supreme Court of Illinois said in the present case, 238 Ill., 430, 440:

> "It is not by virtue of any statute that it has been decided the publication of a book, either in this country or in England, is a surrender by the author of his common law rights and a dedication to the public unless protected by copyright under the statute. The basis of such decisions is, that by causing the book to be printed without the protection of the copyright the author is deemed to have relinquished all rights, both common law and statutory, and to have dedicated his production to the public; and this applies to books published in foreign countries as well as in this country. In the absence of the provision of the English act referred to, that the first public representation or performance of a dramatic piece shall be deemed equivalent, in the construction of that act, to the first publication of a book, it could not be claimed that the performance of "The Fatal Card" in England was a publication, any more than would its performance in this country, while it remained unprinted, be deemed a publication."

This position is strengthened by the fact that even in England, the performance of a play does not in any way affect the rights of the author to subsequently print his play in book form and secure a British copyright thereon. It is apparent that the *playright* and *copyright* are two separate and distinct things under the British law.

In Macgillivray, Law of Copyright, p. 121, the author lays down the rule that

> "The representation or performance of a dramatic piece or musical composition in public, does not deprive the author of his common law right to publish as a book, or of his copyright, when he so publishes."

See also:

> *Chappell* v. *Boosey*, 21 Ch. Div., 232 (1882).
> Scrutton on Copyright, 3rd Ed., p. 75.

If (following the analogy of counsel) a performance in England is not such a publication as to defeat the right to secure a copyright in England, it certainly cannot be such a publication as to defeat the author's common law rights in this country.

In the United States, unlike in England, *statutory* protection to performing rights, is afforded the author only in cases of dramatic composition "for which *copyright* has been obtained." Under our copyright law the playright is embraced in, and cannot exist independently of the copyright, as far as *statutory* protection is concerned except in so far as the rule has been changed by the Copyright Act of July 1, 1909.

We submit that the question here involved is en-

tirely free from doubt and that the decision of the Supreme Court of Illinois is clearly right.

Respectfully submitted,

LEVY MAYER,
Attorney for Defendants in Error.

Chicago, Ill., Nov. 4, 1911.

FERRIS *v.* FROHMAN.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 44. Submitted November 7, 1911.—Decided February 19, 1912.

Although complainant may assert his own common-law copyright to his play, if he alleges that defendant has obtained a copyright for the play sought to be enjoined, and the defendant stands upon the copyright and is enjoined, a Federal right is set up and denied, and this court has jurisdiction to review the judgment, under § 709, Rev. Stat.

Under the law as it existed in 1894, after a play had been performed in England, the rights of the owner to protection against the unauthorized production in England is only that given by the statutes; but the deprivation of common-law rights by force of the statutes was limited by territorial bounds within which the statute was operative.

Public representation in this, or in another, country of a dramatic composition, not printed and published, does not deprive the owner of his common-law right save by operation of statute.

At common law the public performance of a play is not an abandonment to public use.

The purpose and effect of the copyright law is not to render fruits of piracy secure; and a copyright does not protect one producing a play which is substantially a copy of an unprinted and unpublished play, the common-law property right whereof is in another.

238 Illinois, 430, affirmed.

THE facts, which involve the right of authors to unpublished dramatic compositions and productions on the stage, are stated in the opinion.

Mr. Charles H. Aldrich, with whom *Mr. Charles R. Aldrich*, *Mr. Charles G. McRoberts* and *Mr. L. E. Chipman* were on the brief, for plaintiff in error:

Plaintiff in error properly claimed below that the play which he was presenting and against which the injunction was sought, was protected by copyright under § 4952, Rev. Stat., and that the assertion of common-law rights in a drama which had been copyrighted in England by its authors who were citizens of Great Britain was in conflict with the copyright arrangements between Great Britain and this country and the act of March 3, 1891.

The final decision of the Supreme Court of Illinois was against these claimed rights and a Federal question is therefore involved. *Erie R. R. Co.* v. *Purdy*, 185 U. S. 148, 153; *C., B. & Q. Ry. Co.* v. *Illinois*, 200 U. S. 561, 580, 581; *Murdock* v. *Memphis*, 20 Wall. 635; *Pickering* v. *Lomax*, 145 U. S. 310; *U. P. R. R. Co.* v. *Colburn*, 164 U. S. 383; *Green Bay &c. Canal Co.* v. *Patten Paper Co.*, 172 U. S. 58, 68; *Dale Tile Company* v. *Hyatt*, 125 U. S. 46; *Atherton* v. *Fowler*, 91 U. S. 143.

There could have been no decision in favor of the plaintiff below that did not in effect deny the right claimed under the copyright laws of the United States by the defendant below. In such case there is a Federal question whether mentioned in the opinion of the court below or not. *Erie R. R. Co.* v. *Purdy*, 185 U. S. 148, 153; *C., B. & Q. Ry.*

Co. v. *Illinois*, 200 U. S. 561, 580, 581; *Murray* v. *Chatterton*, 96 U. S. 432, 441, 442.

The statute 5 & 6 Vict., c. 45, § 20, makes public performance of a dramatic work with the author's or owner's consent equivalent to the first publication of a book.

And in England it is held that performance in the United States with the owner's consent terminates the author's playright in England and makes the performing right *publici juris*. *Boucicault* v. *Chatterton*, 5 L. R. Ch. Div. 267; *Boucicault* v. *Delafield*, 1 H. & M. 597; 7 & 8 Vict., c. 12, § 19; Drone on Copyright, 583; *Jefferys* v. *Boosey*, 4 H. L. Cas. 815, 847, 852, 856; *Chappell* v. *Purday*, 14 M. & W. 303; *Boosey* v. *Purday*, 4 Ex. Rep. 145.

The performing right or playright had no existence at common law separate and apart from the manuscript of the author, but dates its origin from 3 & 4 Wm. IV, c. 15, and in this country from the act of Congress, August 18, 1856, 11 Stat. 138. *Boucicault* v. *Chatterton*, L. R. 5 Ch. Div. 269; *Wall* v. *Taylor*, 9 L. R. Q. B. D. 727, 730; *Donaldson* v. *Beckett*, 4 Burr. 2408; *Jefferys* v. *Boosey*, 4 H. L. Cas. 815, 920.

The English act was passed to give the right of performance and was brought about by the decision in *Murray* v. *Elliston*, 5 B. & Ald. 657; *Chappell* v. *Boosey*, 21 Ch. Div. 232, 241.

The public performance of a drama is in all respects analogous to the right to multiply copies of a book. It is not a common-law right distinct from the manuscript. Cases *supra* and *Wheaton* v. *Peters*, 8 Pet. 590; *Banks* v. *Manchester*, 129 U. S. 123, 151; *White-Smith Music Co.* v. *Apollo Co.*, 209 U. S. 1, 15.

The statutes and decisions cited make public performance of the play a "publication" equivalent to the publication of a book and the word should have the same meaning in the law of literary property in this country if that equality of right with respect to such property as between

the citizens of the United States and those of the Kingdom of Great Britain intended by the international copyright arrangement and the acts passed to carry it into effect is not to be defeated.

There can be but one publication and it makes no difference where this is made if with the consent of the author or proprietor. *The Mikado Case*, 25 Fed. Rep. 183; Drone on Copyright, pp. 293, 295 and 577; *Boucicault* v. *Wood*, Fed. Cases, No. 1683; *Pierce* v. *Bushnell Mfg. Co.* v. *Werckmeister*, 72 Fed. Rep. 54; 7 Amer. & Eng. Ency. of Law, 2d ed., p. 528, sub. Copyright; 25 Cyc. 1495, and cases cited.

The contention of defendant in error is rendered presumptively unsound by the history of the struggle for international copyright arrangements. 2 Sen. Doc., 24th Cong., 2d Session, Doc. 179, and Messages of President therein; Report Royal Commissioners on Copyright; § 4971, Rev. Stat.; Act March 3, 1891, 26 Stat. 1106–1110.

It was not the intention of Congress to give to foreign citizens and composers advantages in this country which, according to the international copyright convention, were to be denied to citizens of this country abroad. *White-Smith Music Co.* v. *Apollo Co.*, 209 U. S. 1, 15.

No copyright can be obtained in this country after a publication in this or any foreign country. Rev. Stat., § 4956.

Publication puts an end to common-law rights and all rights of the author or proprietor, unless he at the same time takes steps to initiate and secure statutory rights. Drone on Copyright, pp. 100–104; MacGillivray on Copyright, 36–38; *Mercantile Agency* v. *Jewelers' Pub. Co.*, 155 N. Y. 241; *Mifflin* v. *White Co.*, 190 U. S. 260; *Mifflin* v. *Dutton*, 190 U. S. 265.

The two rights do not coexist in the same composition. Drone on Copyright, pp. 100–104; *Bobbs-Merrill Co.* v. *Straus*, 210 U. S. 339, 346; *Fraser* v. *Yack*, 116 Fed. Rep.

285; *Mercantile Agency* v. *Jewelers' Pub. Co.*, 155 N. Y. 241; *Tompkins* v. *Halleck*, 133 Massachusetts, 32, 36.

The claim that this proposition should be limited by adding the words "in the same country," or equivalent words, as contended by counsel for defendant in error, is without foundation.

Copyright in a book or drama is the exclusive right of the owner to multiply and dispose of copies; this is where the drama is treated as a book. Playright is the exclusive right of public performance of the dramatic or musical composition. There is no reason why one should cease upon publication, or when devoted to unrestricted public use, and not the other.

Mr. Levy Mayer for defendants in error:

This court has no jurisdiction of the present writ of error. *Appleby* v. *Buffalo*, 221 U. S. 524; *Waters-Pierce Oil Co.* v. *Texas*, 212 U. S. 86; *Harding* v. *Illinois*, 196 U. S. 78; *Howard* v. *Fleming*, 191 U. S. 126; *Home for Incurables* v. *New York*, 187 U. S. 155; *De Lamars* v. *Nesbitt*, 177 U. S. 523; *Sayward* v. *Denney*, 158 U. S. 180.

The public performance in England of a manuscript play which under the British statutes is made a publication and deprives the author of his common-law right of exclusive representation, does not deprive the author of such common-law right in this country where public performance is not deemed a publication. *Crowe* v. *Aiken*, 2 Biss. 208; *S. C.*, Fed. Cas. No. 3441; *Palmer* v. *De Witt*, 2 Sweeny, 530; *S. C.*, 40 How. Pr. 293; aff'd 47 N. Y. 532; *Tompkins* v. *Halleck*, 133 Massachusetts, 32; Drone on Copyright, 118–121, 554, 574; Wandell, Law of the Theater, 479; 25 Cyc. 1497.

At common law and before the passage of copyright statutes an author had an exclusive property right in his manuscript. Cases *supra*, and see Drone on Copyright, 102.

The public performance of a manuscript drama is not in this country a publication, but the author still retains his common-law right to its exclusive representation. Drone on Copyright Law, 119; cases *supra* and *Boucicault* v. *Hart*, 13 Blatchf. 47; *S. C.*, Fed. Cas. No. 1692; *Aronson* v. *Fleckenstein*, 28 Fed. Rep. 75; 25 Cyc. 1497, and cases cited.

A different rule prevails in England by statute. Stat. 3 & 4 Wm. IV, c. 15; Stat. 5 & 6 Vict., c. 45, § 20; *Boucicault* v. *Delafield*, 1 Hem. & M. 597; *Boucicault* v. *Chatterton*, 5 Ch. Div. 267; Drone on Copyright, pp. 574, 605, 656; MacGillivray on Copyright, 126; Scrutton on Copyright, 3d ed., 72.

The provisions of the English statutes in regard to registration of dramatic compositions are permissive only. Drone on Copyright, pp. 280, 603; MacGillivray on Copyright, 47, 133; Scrutton on Copyright, 3d ed., 88; 8 Halsbury's Laws of England, 179; *Russell* v. *Smith*, 12 Q. B. [Ad. & El. (N. S.)], 217; *Clark* v. *Bishop*, 27 L. T. (N. S.) 908.

The *lex domicilii* cannot fix the status of literary property where the author seeks to enforce rights in respect thereto in a foreign country. 1 Morgan, Law of Literature, 479; Drone on Copyright, 581; Story's Conflict of Laws, § 550; cases *supra*, and *Baglin* v. *Cusenier Company*, 221 U. S. 580; *Minor* v. *Cardwell*, 37 Missouri, 350.

MR. JUSTICE HUGHES delivered the opinion of the court.

This is a writ of error to the Supreme Court of Illinois. The suit was brought by Charles Frohman, Charles Haddon Chambers, and Stephano Gatti (defendants in error), to restrain the production of what was alleged to be a piratical copy of a play known as "The Fatal Card." Its authors were Charles Haddon Chambers and B. C. Stephenson, British subjects resident in London, who com-

posed it there in 1894. The firm of A. & S. Gatti, theatrical managers of London, of which the complainant Gatti is the surviving partner, became interested with the authors and on September 6, 1894, the play was first performed in London. It was registered under the British Statutes on October 31, 1894, and again on November 8, 1894. Charles Frohman, of New York, by agreement of June 13, 1894, obtained the right of production in this country for five years. On March 25, 1895, Frohman acquired all the interest of Stephenson in the play in and for the United States, and it was extensively represented under his supervision. It was not copyrighted here.

George E. McFarlane made an adaptation of this play, called it by the same name, and transferred it to the plaintiff in error, Richard Ferris, of Illinois, who copyrighted it in August, 1900, under the laws of the United States, and later caused it to be performed in various places in this country. The adapted play differed from the original in various details, but not in its essential features.

The Superior Court of Cook County found that the complainants were the sole owners of the original play; that it had never been published or otherwise dedicated to the public in the United States or elsewhere; and that the Ferris play was substantially identical with it. Ferris was directed to account, and was perpetually restrained from producing the adaptation which he had copyrighted. The Appellate Court for the First District reversed the decree (131 Ill. App. 307), but on appeal to the Supreme Court of Illinois this decision was reversed and the decree of the Superior Court was affirmed. 238 Illinois, 430.

The defendants in error contest the jurisdiction of this court upon the ground that the bill was based entirely upon a common-law right of property, and insist that the upholding of this right by the state court raises no Federal question. But the complainants sued, not simply to maintain their common-law right in the original play,

but by virtue of it to prevent the defendant from producing the adapted play which he had copyrighted under the laws of the United States. They challenged a right which the copyright, if sustainable, secured. R. S. 4952. It was necessary for them to make the challenge, for they could not succeed unless this right were denied. Ferris stood upon the copyright. That it had been obtained was alleged in the bill, was averred in the answer, and was found by the court. The fact that the court reached its conclusion in favor of the complainants, by a consideration, on common-law principles, of their property in the original play does not alter the effect of the decision. By the decree Ferris was permanently enjoined "from in any manner using, . . . selling, producing, or performing . . . the said defendant's copyrighted play hereinbefore referred to for any purpose." The decision thus denied to him a Federal right specially set up and claimed within the meaning of § 709 of the Revised Statutes of the United States. This court, therefore, has jurisdiction. *C., B. & Q. Ry. Co.* v. *Drainage Commissioners*, 200 U. S. 561, 580, 581; *McGuire* v. *Commonwealth*, 3 Wall. 382, 385; *Anderson* v. *Carkins*, 135 U. S. 483, 486; *Shively* v. *Bowlby*, 152 U. S. 1, 9; *Northern Pacific R. R. Co.* v. *Colburn*, 164 U. S. 383, 385, 386; *Green Bay &c. Canal Co.* v. *Patten Paper Co.*, 172 U. S. 58, 67, 68.

The substantial identity of the two plays was not disputed in the appellate courts of Illinois and must be deemed to be established. The contention was, and is, that after the public performance of the original play in London in 1894, the owners had no common-law right, but only the rights conferred by the British statutes; and that Frohman's interest (save the license which expired in 1899) was subsequently acquired. Hence, it is said, the play not being copyrighted in the United States was *publici juris* here and the adapter was entitled to use it as common material.

Performing right was not within the provisions of 8 Anne, c. 19, which gave to authors the sole liberty of printing their books. *Coleman* v. *Wathen*, 5 T. R. 245. The act of 1833, known as "Bulwer-Lytton's Act," conferred statutory playright in perpetuity throughout the British dominions, in the case of dramatic pieces not printed and published; and for a stated term, if printed and published. 3 & 4 Wm. IV, c. 15. By § 20 of the Copyright Act of 1842, 5 & 6 Vict., c. 45, it was provided that the sole liberty of representing any dramatic piece should be the property of the author and his assigns for the term therein specified for the duration of copyright in books. The section continued: "and the Provisions hereinbefore enacted in respect of the Property of such Copyright, and of registering the same, shall apply to the Liberty of representing or performing any Dramatic Piece or Musical Composition, as if the same were herein expressly reënacted and applied thereto, save and except that the first public Representation or Performance of any Dramatic Piece or Musical Composition shall be deemed equivalent, in the Construction of this Act, to the first Publication of any Book." Mr. Scrutton, in his work on copyright (4th ed., p. 77), states that it is "probable, though there is no express decision to that effect, that the court, following *Donaldson* v. *Beckett* (2 Bro. Cases in Parl. 129), would hold the common-law right destroyed by the statutory provisions after first performance in public." Compare MacGillivray on Copyright, pp. 122, 127, 128. And it may be assumed, in this case, that after the play had been performed the right of the owners to protection against its unauthorized production in England was only that given by the statutes.

Further, in the absence of a copyright convention, there is no playright in England in the case of a play, not printed and published, where the first public performance has taken place outside the British dominions. This

results from § 19 of the act of 7 & 8 Vict., c. 12, known as the International Copyright Act, which provides: "Neither the Author of any Book, nor the Author or Composer of any Dramatic Piece or Musical Composition, . . . which shall after the passing of this Act be first published out of Her Majesty's Dominions, shall have any Copyright therein respectively, or any exclusive Right to the public Representation or Performance thereof, otherwise than such (if any) as he may become entitled to under this Act." The provision applies to British subjects as well as to foreigners, and the words "first published" include the first performance of a play. In *Boucicault* v. *Delafield* (1 H. & M. 597), the author of the play known as "The Colleen Bawn" filed a bill to restrain a piratical production. It appeared that the play had first been represented in New York, and by reason of that fact—there being no copyright convention with the United States—it was held that, under the statute above quoted, there was no playright in England. To the same effect is *Boucicault* v. *Chatterton* (5 Ch. Div. 267), where the author unsuccessfully sought to restrain an unauthorized performance of "The Shaughraun," an unprinted play which had first been represented here.

The British Parliament, in thus fixing the limits and conditions of performing rights, was dealing with rights to be exercised within British territory. It is argued that the English authors in this case, by the law of their domicile, were without common-law right and in its stead secured the protection of the British statutes which cannot avail them here. But the British statutes did not purport to curtail any right of such authors with respect to the representation of plays outside the British dominions. They disclose no intention to destroy rights for which they provided no substitute. There is no indication of a purpose to incapacitate British citizens from holding their intellectual productions secure from interference in other

jurisdictions according to the principles of the common law. Their right was not gone *simpliciter*, but only in a qualified sense for the purposes of the statutes, and there was no convention under which the authors' work became public property in the United States. See *Saxlehner* v. *Eisner*, 179 U. S. 19, 36; *Saxlehner* v. *Wagner*, 216 U. S. 375, 381. When § 20 of the act of 5 & 6 Vict., c. 45, provided that the first public performance of a play should be deemed equivalent, in the construction of that act, to the first publication of a book, it simply defined its meaning with respect to the rights which the statutes conferred. The deprivation of the common-law right, by force of the statute, was plainly limited by the territorial bounds within which the operation of the statute was confined.

The present case is not one in which the owner of a play has printed and published it and thus, having lost his rights at common law, must depend upon statutory copyright in this country. The play in question has not been printed and published. It is not open to dispute that the authors of "The Fatal Card" had a common-law right of property in the play until it was publicly performed. *Donaldson* v. *Beckett*, 2 Bro. Cases in Parl. 129; *Prince Albert* v. *Strange*, 1 MacN. & G. 25; *Jefferys* v. *Boosey*, 4 H. L. C. 815, 962, 978. And they were entitled to protection against its unauthorized use here as well as in England. *Wheaton* v. *Peters*, 8 Pet. 591, 657; *Paige* v. *Banks*, 13 Wall. 608, 614; *Bartlett* v. *Crittenden*, 5 McLean, 32; *Crowe* v. *Aiken*, 2 Biss. 208; *Palmer* v. *De Witt*, 2 Sweeny, 530; 47 N. Y. 532.

What effect, then, had the performance of the play in England upon the rights of the owners with respect to its use in the United States? There was no statute here by virtue of which the common-law right was lost through the performance of the unpublished play. The act of August 18, 1856 (11 Stat. 138, c. 169), related only to dramatic compositions for which copyright had been

obtained in this country; its object was to secure to the author of a copyrighted play the sole right to its performance after it had been printed. *Boucicault* v. *Fox*, 5 Blatchf. 87, 97, 98. The same is true of the provisions of the Copyright Act of July 8, 1870 (16 Stat. 198, 212, 214; R. S. 4952, 4966), and of those of the act of March 3, 1891 (26 Stat. 1106, 1107), which were in force when the transactions in question occurred and this suit was brought. The fact that the act of March 3, 1891, was applicable to citizens of foreign countries, permitting to our citizens the benefit of copyright on substantially the same basis as its own citizens (§ 13), and that proclamation to this effect was made by the President with respect to Great Britain (27 Stat. 981), did not make the British statutes operative within the United States. Nor did that fact add to the provisions of the act of Congress so as to make the latter destructive of the common-law rights of English subjects in relation to the representation of plays in this country, which were not copyrighted under that act and which remained unpublished. These rights, like those of our own citizens in similar case, the act of 1891 did not disturb.

The public representation of a dramatic composition, not printed and published, does not deprive the owner of his common-law right, save by operation of statute. At common law, the public performance of the play is not an abandonment of it to the public use. *Macklin* v. *Richardson*, Ambler, 694; *Morris* v. *Kelly*, 1 Jac. & W. 481; *Boucicault* v. *Fox*, 5 Blatchf. 87, 97; *Crowe* v. *Aiken*, 2 Biss. 208; *Palmer* v. *De Witt*, 2 Sweeny, 530, 47 N. Y. 532; *Tompkins* v. *Halleck*, 133 Massachusetts, 32. Story states the rule as follows: "So, where a dramatic performance has been allowed by the author to be acted at a theatre, no person has a right to pirate such performance, and to publish copies of it surreptitiously; or to act it at another theatre without the consent of the author

or proprietor; for his permission to act it at a public theatre does not amount to an abandonment of his title to it, or to a dedication of it to the public at large." 2 Story, Eq. Jur., § 950. It has been said that the owner of a play cannot complain if the piece is reproduced from memory. *Keene* v. *Wheatley*, 9 Am. Law Reg. 33; *Keene* v. *Kimball*, 16 Gray, 545. But the distinction is without sound basis and has been repudiated. *Tompkins* v. *Halleck*, *supra*.

And, as the British statutes did not affect the common-law right of representation in this country, it is not material that the first performance of the play in question took place in England. In *Crowe* v. *Aiken* (1870), *supra*, the play "Mary Warner" had been composed by a British subject. It was transferred to the plaintiff with the exclusive right to its representation on the stage in the United States for five years from June 1, 1869. It had not been printed with the consent either of the author or of the plaintiff. It was first publicly performed in London in June, 1869, and afterwards was represented here. The court (Drummond, J.), held that the plaintiff by virtue of his common-law right was entitled to an injunction restraining an unauthorized production. In *Palmer* v. *De Witt* (1872), *supra*, the suit was brought to restrain the defendant from printing an unpublished drama called "Play," composed by a British citizen resident in London. The plaintiff on February 1, 1868, had purchased the exclusive right of printing and performing the play in the United States. On February 15, 1868, it was first performed in London. It was held that the common-law right had not been destroyed by the public representation and the plaintiff had judgment. In the case last cited, and apparently in that of *Crowe* v. *Aiken*, the transfer to the plaintiff antedated the public performance, but neither decision was rested on that distinction. In *Tompkins* v. *Halleck* (1882), *supra*, an unpublished play called

"The World" had been written in England where, after being presented, it was assigned by the author to a purchaser in New York. It was acted in that city and then transferred to the plaintiffs with the exclusive right of representation in the New England States. The plaintiffs' common-law right was sustained and an unauthorized performance was enjoined.

Our conclusion is that the complainants were the owners of the original play and exclusively entitled to produce it. Their common-law right with respect to its representation in this country had not been lost. This being so, the play of the plaintiff in error, which was substantially identical with that of the complainants, was simply a piratical composition. It was not the purpose or effect of the copyright law to render secure the fruits of piracy, and the plaintiff in error is not entitled to the protection of the statute. In other words, the claim of Federal right upon which he relies is without merit.

Judgment affirmed.